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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1325.

THE WESTERN UNION TELEGRAPH COMPANY,
APPELLANT,

vs.

THE ATTORNEY GENERAL OF THE COMMONWEALTH
OF MASSACHUSETTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED DECEMBER 17, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 20, 1887.

1 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss:*

Court and title of cause.

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Saturday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

Before the Honorable Le Baron B. Colt, circuit judge.

ATTORNEY GENERAL OF COMMONWEALTH OF MASSACHUSETTS, by Information, *vs.* WESTERN UNION TELEGRAPH COMPANY. } No. 2297, Equity Docket.

This cause was begun in the supreme judicial court of the Commonwealth of Massachusetts for the county of Suffolk, and was removed to this circuit court upon the petition of the defendant and here entered at the May term, A. D. 1886.

2 Upon entry of said cause in this circuit court on the fifteenth day of May, A. D. 1886, attested copies of the following papers on file in said supreme judicial court were filed, namely: 1, bill of complaint; 2, subpœna; 3, petition for removal; 4, order for removal; 5, bond for removal:

1. *Bill of Complaint.* (*Filed in State Court April* 27, 1886.)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

To the honorable the justices of the supreme judicial court, sitting in equity:

Informing, showeth unto your honors Edgar J. Sherman, attorney general of the Commonwealth of Massachusetts, at the relation of Alanson W. Beard, treasurer of said Commonwealth, for and on behalf of said Commonwealth, that the Western Union Telegraph Company is, and from a time anterior to the first day of May, 1885, has been a corporation, which owns or controls and uses, under lease or otherwise, a line of telegraph within said Commonwealth, for purposes of business or profit, and having a capital stock divided into shares, and a corporation embraced within

3 the provisions of section forty-two of chapter thirteen of the public statutes; that on the sixteenth day of September, 1885, in accordance with the provisions of said chapter, the tax commissioner of said Commonwealth, acting under the provisions of said chapter, duly ascertained and estimated the fair cash valuation of all the shares constituting the capital stock of said corporation on the first day of May aforesaid; that said valuation thus ascertained and determined was, on said first day of May, forty-seven million

five hundred thousand dollars; that said tax commissioner also ascertained and determined that the credits to said corporation were, on said first day of May, of the value of eight millions seven hundred eighty-six thousand and seventy-six dollars; that the total number of miles of line of said corporation was 146,052.60, 143,219.55 of which were beyond the limit of the said Commonwealth, leaving 2,833.05 miles within the limits of said Commonwealth; that in accordance with the provisions of the fortieth section of said chapter, $38,713,924, the total valuation of said stock, divided by 146,052.60, the total number of miles of line, and multiplied by 2,832.05, the number of miles of line within the Commonwealth, gives $750,952 as the taxable value of the shares of said corporation within said Commonwealth; that the rate of taxation for said year 1885, duly determined in accordance with the provisions of the fortieth section of said thirteenth chapter of the Public Statutes, was $14.14 for and upon each $1,000 of valuation; that the tax commissioner of the Commonwealth, on the third day of October, 1885, notified, in accordance with the provisions of the fifty-third section of said chapter, the treasurer of said corporation that a tax would be due and payable to the treasurer of the Commonwealth by said corporation in thirty days from the date of said notice, provided said tax should not be due and payable before the first day of November, 1885; that the amount of said tax was $10,618.46, and also notified the treasurer of said corporation that within ten days from the date of said notice said corporation might apply for a correction of said tax and be heard thereon before the board of appeal provided in said chapter.

And said attorney general, at the relation aforesaid, says that by virtue of said statute and said proceedings said corporation became liable and was bound to pay to the treasurer of the said Com-
4 monwealth said tax in thirty days from the date of said notice, provided, however, that said tax should not be payable before the first day of November, 1885, but the said corporation has not paid said taxes to said treasurer of the Commonwealth or any portion thereof, and has neglected and failed to pay the same, and still owes the same to said Commonwealth, and interest thereon at the rate of twelve per cent. per annum.

Wherefore, pursuant to said statute, your informant prayeth your honors to order and decree that said sum due for taxes as aforesaid shall be paid to said Commonwealth by the said corporation, with interest thereon, together with the costs of this information, and to grant unto your informant a writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said corporation and its officers, agents, and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth as aforesaid for taxes as aforesaid shall have been fully paid, with interest and costs; and your informant prayeth your honors to grant unto said Commonwealth such other and further relief in the premises as the nature of the circumstances of this case may require and to your honors shall seem meet.

And to the end that the said Western Union Telegraph Company may full and true answer make to all and singular the matters as aforesaid, may it please your honors to grant unto your informant a writ of subpœna, to be directed to said corporation, thereby
5 commanding it, at a certain time and under a certain penalty therein to be limited, to appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide each further order, direction, and decree therein as to your honors shall seem meet.

EDGAR J. SHERMAN,
Attorney General.

2. *Subpœna.* 3. *Petition for Removal.*

(MEMORANDUM.—By direction of counsel for both parties the above papers, 2 and 3, are omitted in this record.
JOHN G. STETSON, *Clerk.*)

4. *Order for Removal.*

COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

Supreme Judicial Court.

ATTORNEY GENERAL, by Information,

v.

WESTERN UNION TELEGRAPH COMPANY.

6 And now in the above-entitled cause it appearing to the court that the defendant has duly filed in this court its petition praying for the removal of said cause to the circuit court of the United States of America for the district of Massachusetts, and also a satisfactory bond, pursuant to the statute of the United States, which has been approved by this court:

It is ordered that this cause be removed to the said circuit court in accordance with the prayer of the petition.

By the court:

JOHN NOBLE, *Clerk.*

May 13, 1886.
Copy.
Attest:

JOHN NOBLE, *Clerk.*

5. *Bond for Removal.*

(MEMORANDUM.—By direction of counsel for both parties the above paper, 5, is omitted in this record.
JOHN G. STETSON, *Clerk.*)

7 On the twenty-ninth day of May, A. D. 1886, the following answer was filed in this circuit court:

Answer. (*Filed May* 29, 1886.)

The answer of the Western Union Telegraph Company to the information of said attorney general.

This respondent, now and at all times hereafter, saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in said information contained, for answer thereto, or to so much thereof as this respondent is advised is material or necessary for it to make answer to, answering, saith that this respondent is, and before and on and since the twenty-fourth day of July, in the year 1886, was and has been a corporation chartered and organized in the State of New York under the laws of said State, having a capital stock divided into shares, which owns, controls, or uses lines of telegraph in various parts of the United States and in the said State of Massachusetts, constructed and maintained, as hereinafter set forth, largely in said State over and along the post roads of the United States, which have been declared to be such by law, and over, under, and across the navigable streams or waters of said United States in or adjoining said State; that on the fifth day of June, in the year 1867, said company duly accepted, and soon thereafter, to wit, on or about the twelfth day of June, in said year, duly filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations required by law, under and in accordance with the act of the Congress of the United States of July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes."

That upon such filing it became entitled to and had, and hath ever since had, the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared

8 such by law, and over, under, or across the navigable streams or waters of the United States; and by and under said act and acceptance and filing the said company became and hath ever since been bound and obliged to give priority over all other business to telegrams between the several departments of the Government of the United States and their officers and agents in their transmission over the lines of the said company, at such rates as the said Postmaster General has or shall annually fixed or fix, and to sell all its telegraph lines, property, and effects to said United States at an appraised value to be ascertained by five competent, disinterested persons, two of whom shall be selected by said Postmaster General, two by the said company, and one by the four so previously elected, and also liable to a penalty of not less than one hundred or more than one thousand dollars for each refusal or neglect to transmit any

such telegraphic communications as are provided for by the aforesaid act, or by title LXV of the Revised Statutes of the United States, or by the provisions of section 221, title, "The Department of War," authorizing the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent and for giving notice on the northern lakes and seaboard of the approach and force of storms.

And so this respondent avers that the laws of the United States have declared and provided that the erection and maintenance of telegraphic lines shall, so far as State interference is concerned, be free to all telegraph companies who will submit to the conditions imposed by such laws; that no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of the privileges secured by such laws; and this respondent avers that it has submittod to and accepted said conditions, and is willing and hath declared its purpose and desire to avail itself of said privileges.

And the respondent further says that its lines extend to and from said State of Massachusetts into and through most of the States and Territories of the United States and to Washington, in the District of Columbia, and connect with those owned and established by the Government of the United States for public purposes, and that said company is in close communication with other telegraph com-
9 panies doing business in this country and abroad—that is to say, in and out of the United States and beyond seas.

And this respondent further avers that in the exercise of the powers and privileges conferred upon it by law as aforesaid it did, on and before and since the first day of May, 1885, rightfully construct, operate, and maintain lines of telegraph in various parts of said State largely upon, over, and along post roads of the United States, declared to be such by law, lying in said State of Massachusetts, and over, under, and across the navigable streams and waters of said United States, lying and being in or adjoining said State, and did and does transact its general business, and for a long time and ever since said filing hath transmitted and doth continually and constantly transmit telegrams between the several departments of said Government and such telegraphic communications as are provided for as aforesaid for the signal service, so called, and other purposes, at rates fixed as aforesaid by said Postmaster General, on and over said lines maintained on said post roads in said State, and on and over other lines of telegraph therewith connected, owned or controlled or used and maintained by it in and through other parts and States of said United States, and thereby became and was and is an instrument of foreign and interstate commerce, and is a Government agent for the transmission of Government business and of messages on public business and commercial and other messages in general between said State of Massachusetts and points therein and other States of the United States and points therein, and over and through said State from and to and into other States of the United States, as well as within said State, and made and makes use of said lines on said post roads, and uses the franchises and privileges granted and secured to it by said

act of July 24 on and over said post roads for foreign and interstate commerce and in and for the service and business of the United States, which it is bound by law to render and perform and does continually and constantly render to said United States as aforesaid; but now so it is, and this respondent avers, that the general court or Legislature of said State, with the approval of the Governor thereof, did, before said first day of May, enact, in substance (but as more fully set forth in sections 38, 39, 40, 41, and 42 of chapter 13
10 of its public statutes, whereto this respondent prays that reference may be had as if fully and at length set forth herein), that this respondent, as well as other like companies, should annually return to the tax commissioner of said State the amount of its capital stock, the number of shares thereof, and the par and market value of said shares on the first day of May, with a statement of the works, structures, real estate, and machinery owned by it and subject to local taxation within said State; also the whole length of its lines and the length of so much thereof as is or should be without said State; that said tax commissioner should ascertain, from said return or otherwise, the fair market value of said shares and estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on said first day of May, which should be taken as the true value of the corporate franchise of said company for the purpose of the tax hereinafter mentioned; and that this respondent should annually pay a tax to said State upon said corporate franchise at said valuation thereof equal to the aggregate value of the shares of its capital stock, ascertained as aforesaid, as provided by said section 39, after deducting such portion of said valuation as should be proportional to the length of that part of its line lying without said State, and also deducting the value of that part only of its real estate and machinery located and subject to local taxation within said State.

And this respondent further says that, in submission to the demands and enactments of said State of Massachusetts, it did make such return in the words and figures set forth in the paper hereto annexed, marked "A," setting forth the facts therein stated, which this respondent avers to be true as so set forth, accompanied by a communication in its behalf to the Hon. Daniel A. Gleason, the treasurer and tax commissioner of said State, of which the following is a copy:

JUNE 27, 1885.

To the Hon. Daniel A. Gleason, treasurer and receiver general and tax commissioner of the Commonwealth of Massachusetts.

SIR: In behalf of the Western Union Telegraph Company, we respectfully call your attention to the act of Congress of the
11 United States, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 24, 1866, and to the inclosed copy of the acceptance, filed on June 8, A. D. 1867, of said act by said company, certified by the Postmaster General of said United States. The act is now contained in

title LXV, section 5263 to 5269, both inclusive, of the Revised Statutes of the United States. Under this act and the said acceptance the said company respectfully claims and submits that no tax can be legally assessed by authority of said Commonwealth upon said company or its franchises, rights, privileges, or property which is or involves any taxation of or interference with the rights, privileges, and franchises granted by said act and which said company is entitled to and enjoys under said act by virtue of its acceptance thereof, to construct, maintain, and operate lines of telegraph over and along post roads of the United States within said Commonwealth, and that a tax upon its corporate franchise assessed in the manner provided by the laws of said Commonwealth, if any portion of the length of its lines constructed, maintained, and operated on post roads of the United States within said Commonwealth is included as part of the length of its lines within said Commonwealth, in ascertaining and determining the valuation or sum on which such tax is to be assessed, is not valid under the Constitution and laws of the United States or the constitution of said Commonwealth; and said company further submits that, even if said tax is otherwise valid, in ascertaining and determining said valuation or sum an amount equal to the value of its real estate and machinery located and subject to local taxation without the said Commonwealth ought to be deducted from the value of its shares, ascertained as provided by said laws, and that without such deduction said tax is not proportional or reasonable or just or valid under the Constitution and laws of the United States or the constitution of said Commonwealth.

Said company respectfully claims and submits that any such tax, and any tax assessed in the manner and upon the principles on which a tax was assessed on its franchise in the year 1884, or in like manner theretofore, is invalid, and does not waive any objection to any tax assesssed or any part thereof or admit its validity to any extent or in any form; but said company would not refuse to pay for the year 1885 a tax assessed and ascertained by allowing such deduction, and not including as a part of the length of its lines in Massachusetts that portion of its lines constructed, maintained, and operated over and along post roads in that State, but otherwise in conformity with the laws of said State, not, however, admitting the validity of such a tax; but it respectfully protests against any tax not so assessed and ascertained as last aforesaid.

12 And it now submits the accompanying return containing the statement of facts required by said laws with a view to such an assessment. All by the undersigned, its attorneys, who are,

Very respectfully & truly yours,

GEO. S. HALE, *of Boston*,
WILLARD BROWN, *of New York*,
By GEO. S. HALE.

And this respondent, further answering, avers that the whole length of its lines in said month of May, within and without said

State, did not exceed one hundred and forty-six thousand fifty-two and sixty one-hundredths ($146{,}052\frac{60}{100}$) miles, and the whole length of its lines within said State, not on, over, or along post roads of the United States, declared to be such by law, or over, under, or across the navigable streams or waters of the United States, did not exceed $498\frac{50}{100}$ miles, and that all the remainder of its lines within said State was on, over, or along such post roads, or over, under, or across such streams of water, and that this respondent then owned real estate without said State, located and subject to local taxation in other States and Territories of said United States, or in said District, to the amount and value of $\$3{,}058{,}993\frac{80}{100}$, whereon local taxes were assessed and paid by the respondent in and for said year 1885 to the amount of over forty-seven thousand dollars ($47,000), besides and in addition to taxes in said year assessed in such other States or Territories or District to this respondent not upon real estate, and duly paid by it.

And this respondent, further answering, says that said tax commissioner, acting for and in behalf of said State, and said State by him assumed to ascertain and estimate the fair cash valuation of all the shares constituting its capital stock on said first day of May at "forty-seven million five hundred thousand dollars," and to determine that the only deductions therefrom or credits to said corporation on which — ought to be made were in all:

For its own unissued shares of said stock, say twelve thousand four hundred and fifty-three and ninety one-hundredths dollars	$12,453 90
For stocks in other companies outside of its system, not included in said miles of line, say eight million seven hundred and seventy-three thousand six hundred and twenty-two and seventy one-hundredths dollars	8,773,622 70
Amounting in all to, say, eight million seven hundred and eighty-six thousand and seventy-six dollars	$8,786,076 00
Leaving a valuation of, say, thirty-eight million seven hundred and thirteen thousand nine hundred and twenty-four dollars	38,713,924 00

And that nothing whatever ought to be deducted or credited as aforesaid on account of said real estate.

And from said last-mentioned valuation deducted such portion thereof as was proportional to what he assumed to be the length of that part of the respondent's line lying without said State, being one hundred and forty-three thousand two hundred and fifty-five one-hundredths miles—that is to say, $\frac{14325}{146052}$ of the whole length of all its lines within and without said State, and of said valuation, amounting to thirty-seven million nine hundred and sixty-two thousand nine hundred and seventy-two dollars ($37,962,972), and as aforesaid, nothing whatever on account of said real estate out of said State; and assessed to this respondent a tax on its franchises, at a

valuation of seven hundred and fifty thousand nine hundred and fifty-two dollars ($750,952), of ten thousand six hundred and eighteen and forty-six one-hundredths dollars ($10,618.46), at the rate ascertained in accordance with the fortieth section of the thirteenth chapter of the Public Statutes of said Commonwealth, of $14.14 per $1,000.

And this respondent does not deny but admits that its property in said State of Massachusetts is subject to taxation the same as other property, and that it may be taxed in a proper way thereon, yet it respectfully submits and avers that this respondent does not derive its existence from the laws of said State, or derive the right to have and exercise its said franchises, rights, and privileges from said State, or hold them subject to its control, and that said franchise tax is clearly not a tax on its property in any legal sense, and cannot be held valid as such; that it is in the nature of an
14 excise on the exercise of all the franchises, rights, and privileges enjoyed by this respondent in the conduct of its business, and a tax on its operations in such exercise; that, while it is claimed by the officers of said State and by said attorney general that the laws imposing said tax are founded on the alleged right of said State to refuse to this respondent the right or permission to transact its business or exercise its functions, franchises, rights, and privileges within said State, except for such price and on such terms and conditions, including the payment of such taxes as said State may see fit to prescribe and assess, and to compel the performance of, and to exclude this respondent from such transaction or exercise if the same are not performed and obeyed.

Yet this respondent avers that said franchise tax has not and cannot have this or any legal foundation, and that it includes and is a tax or assessment on the rights, privileges, and franchises granted and secured to this respondent by the United States by the said act of Congress, and on the use thereof by this respondent as an instrument of commerce and as a Government agent for the transmission of public business by means thereof, and on its operation in said State, which said State cannot limit, control, refuse, or tax.

That even if said tax could in any form be so properly levied and assessed on the use of such rights and privileges for other purposes, which this respondent denies, it is not only impossible in this case to indicate or designate the portion of the burden of said franchise tax on said use as an instrument of commerce and as a Government agent or on any use for other purposes, but that the mode of valuation thereof specifically prescribed by said act does in terms include and designate as a subject of taxation the franchise exercised on that portion of this respondent's lines constructed, maintained, and used in the exercise and enjoyment of said rights and privileges, and that the said tax bears upon the whole machine without distinction and indistinguishably as well upon the faculty of receiving and transmitting the messages of the Government of said United States as on that of receiving and transmitting messages of individuals, and as well upon the faculty of receiving and transmitting through
15 said State messages sent and received in and for the purposes

of foreign and interstate commerce as of receiving and transmitting other messages or wholly within said State.

And this respondent further avers that if said franchise tax could in form be legally so levied and assessed as to operate upon only something legally subject to taxation by said State by any mode of estimate or valuation resembling that prescribed by said laws, based upon a valuation of its shares, deducting real estate locally taxed in said State, it would be and is unjust and not proportional not to deduct from said valuation the amount of real estate owned by and subject to local taxation and actually taxed out of said State, both because the laws of said State allow such deduction from the valuation under said laws for like taxation of the franchises of other corporations organized or chartered within and doing business within and without said State, and because otherwise said State would assume and does assume in effect to tax and assess real estate situated in and subject to taxation and actually taxed by other States and jurisdictions.

This respondent, further answering, admits that the tax commissioner of the Commonwealth, on the third day of October, 1885, notified, in accordance with the provisions of the fifty-third section of said chapter, the treasurer of said corporation that a tax would be due and payable to the treasurer of the Commonwealth by said corporation in thirty days from the date of said notice, provided said tax should not be due and payable before the first day of November, 1885; that the amount of said tax was $10,618.46, and also notified the treasurer of said corporation that within ten days from the date of said notice said corporation might apply for a correction of said tax and be heard thereon before the board of appeals provided in said chapter.

But, for the reasons aforesaid, this respondent submits and avers that said franchise tax of $10,618.40 assessed to and upon it is disproportional, illegal, unconstitutional, and void, and denies that it owes the same to said State or owes to it any interest thereon, and avers that this respondent ought not to be required to pay the same or to desist and refrain from the further prosecution of its business and the use and enjoyment of its said rights, privileges, and franchises, as prayed by said information.

16 All which matters and things this respondent is ready and willing to aver, prove, and maintain as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

Dated this twenty-eighth day of May, A. D. 1886.

THE WESTERN UNION TELEGRAPH COMPANY,

[SEAL] By NORVIN GREEN, *President.*

A.

WESTERN UNION TELEGRAPH COMPANY.
TREASURER'S OFFICE, NEW YORK, *June* 25, 1885.

Hon. Daniel A. Gleason, tax commissioner of the Commonwealth of Massachusetts.

SIR: I, Roswell H. Rochester, treasurer of the Western Union Telegraph Company, hereby return that on the first day of May, 1885, said corporation held its principal place of business at the city of New York.

Its capital stock was	$80,000,000 00
The whole number of its shares was 800,000.	
The par value of each share was	100 00
The market value of each share was	59 37½
The value of the real estate owned by the corporation without the State of Massachusetts was	3,058,933 82
The value of the real estate owned by the corporation within the State of Massachusetts was nothing.	
The total number of miles of line owned or leased was 146,052.60.	
Of which the number of miles (not on post roads of the United States and excluding 2,334.55 miles which were on post roads of the United States) within the State of Massachusetts was 498.50.	
Total property, 800,000 shares, at $59.37½ per share	47,500,000 00
This includes—	
Real estate	3,058,933 82
Two hundred and nine three-fourth shares held by this company unissued, at $59.37½	12,453 90
Stocks in other companies outside of our system, not included in above statement of miles of line	8,773,622 70
Balance value of 146,052.60 miles of line	35,654,989 58
Value, at same rate, of said 498.50 miles as the valuation of the corporate franchise of said company for taxation under the laws of Massachusetts	121,695 97

17 This return includes the lines and property of the American Union Telegraph Company, the Franklin Telegraph Company, the Mutual Union Telegraph Company, and the Gold and Stock Telegraph Company as part of the Western Union lines.

Respectfully yours,

R. H. ROCHESTER, *Treasurer.*

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

JUNE 25, 1885.

Then personally appeared the above-named Roswell H. Rochester and made oath that the foregoing return is true to the best of his knowledge, information, and belief.

Before me—

[SEAL.] WM. ARNOUX,
Notary Public, New York and Kings Cos.

On the fifth day of June, A. D. 1886, the following replication was filed:

Replication. (*Filed June 5, 1886.*)

And now comes the plaintiff and joins issue on the respondent's answer.

HARVEY N. SHEPARD,
Assistant Attorney General.

This cause was thence continued to the October term, A. D. 1886, when the following agreement was filed:

Agreement for Examiner. (*Filed Nov. 2, 1886.*)

The above case, answer and replication having been filed, may be forthwith referred to Francis S. Fiske, Esq., as examiner, to take and report the evidence of both parties therein and such questions of law arising thereon as either party shall desire.

HARVEY N. SHEPARD,
Assistant Attorney General.
GEO. S. HALE,
For the Western Union Telegraph Company.

18 On the fourth day of May, A. D. 1887, the following report was filed:

Examiner's Report. (*Filed May 4, 1887.*)

I, Francis S. Fiske, having been appointed by the court a special examiner in the above-named case, report—

That the information was filed in the supreme judicial court of the State April 27, 1886, and removed to this court by the defendant; that the defendant is a telegraph company organized under the laws of the State of New York before the passage of the act of the Congress of the United States of July twenty-fourth, eighteen hundred and sixty-six, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes" (see U. S. Rev. St's, title LXV, sec. 5263, *et seq.*), and is a corporation organized for purposes of business and profit, having a capital stock divided into shares,

which filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations required by law in accordance with said act on or about the twelfth day of June, 1867, and has ever since been in existence and operation.

That on and before and since the first day of May, 1885, it has owned, controlled, and used, under lease or otherwise, a line or lines of telegraph within said Commonwealth as part of a system of 146,052 and $\frac{60}{100}$ miles of line extending throughout the United States, part of Canada, and to Cuba and England by submarine ocean cable, connecting with lines owned and established by the Government of the United States for public purposes.

That on the sixteenth day of September, in said year 1885, after notice had been given to said Commonwealth of said filing and of other matters mentioned in the notice hereto appended, as below stated, and a return made by said company under section 42 of chapter 13 of the Public Statutes of said Commonwealth, copies of which notice and return are appended, the tax commissioner of said Commonwealth, in the manner required by its laws, estimated the fair cash valuation of all the shares constituting the capital stock of said corporation on said first day of May at
19 $47,500,000, and allowed as credits to said corporation out of said $47,500,000 the sum or value of $8,786,076.

For 209$\frac{3}{4}$ shares held by the company unissued, at 59.37\frac{1}{2}$	$12,453 90
For stock in other companies outside of its system not included in above statement of miles of line	8,773,622 70
	$8,786,076 60

And determined the total number (or whole length) of the miles of line of said defendant to be 146,052.60 as aforesaid and 143,219.55 miles thereof, which included said cables, to be beyond the limits of said Commonwealth.

That the rate determined under the fortieth section of said thirteenth chapter of said Public Statutes for the taxation of the corporate franchises therein mentioned was, in and for the year 1885, $14.14 for each $1,000 of valuation.

That said commissioner, being of opinion that the valuation of the corporate franchise of said defendant for taxation by said Commonwealth was to be ascertained by deducting from said $47,500,000 00
The said 8,786,076 00

Thus leaving $38,713,924 00
And then taking as the total number of miles of said line or lines 146,052.60
And as the number thereof in said Commonwealth 2,833.05
Without regard to the question whether any thereof were or were not on post roads, declared such by law, or navigable streams or waters of the United States, considered that the valuation of the corporate franchise of said defendant subject to be taxed in said Com-

monwealth at said rate was $\frac{2,833.05}{140,052.60}$ of said $38,713,924, or in all ($750,952) seven hundred and fifty thousand nine hundred and fifty-two dollars, and assessed a tax thereon of ($10,618.46) ten thousand six hundred and eighteen and $\frac{46}{100}$ dollars to said company.

That in fact more than 2,334.55 miles of said line within said Commonwealth, part of said 2,833.05 miles, were on, over, under, or across said post roads—that is to say, railroads or highways made by law such post roads—or such streams or waters.

20 That before and during said year and since said defendant has continually transmitted over said lines on said post roads, streams, or waters between the several departments of the United States Government and their officers and agents or as provided by sect. 221 of the Revised Statutes of the United States, at rates fixed by the Postmaster General, as required by said act of Congress or title LXV of said section, telegraphic communications and messages for the Government of the United States, including those for the signal service relating to the weather, storms, etc., and also commercial and business messages for purposes of foreign and interstate commerce from and to, into, through, and over and between said State of Massachusetts and all the other States and Territories of the United States, the city of Washington and the District of Columbia, and to and from foreign countries by ocean submarine cables both for said Government and for many private individuals and corporations resident and located as well out of as in said State.

That it is impossible for said company to determine what portion of any sums received by it was received for services performed in said State in the transmission through the same or any part thereof of messages or communications received or delivered out of it or not on lines over said post roads, streams, or waters, but that the largest part, or approximately seventy per cent., of said sums was for messages received or deliverrd out of said State.

That said defendant, on said first day of May, 1885, owned a large amount of real estate located and subject to local taxation out of said State of Massachusetts, on which there was assessed and paid by it a large amount (over $48,000) of taxes, besides other taxes.

That the amount or value of said real estate was not clearly shown, but it was shown that the cost of land and buildings thereon owned by the defendant and of buildings so owned on land not so owned out of said State was over $3,000,000; and it was agreed by the said parties that if it appeared and became material upon any final decision in this case to fix the amount or value of said real estate or the taxes thereon or the amount received for any class of messages and was not agreed upon by them the same should be determined on further hearing by the examiner.

21 That no deduction or allowance was made in assessing said tax or in ascertaining the valuation of said franchise for taxation as aforesaid on account of said real estate, land, or buildings, or the taxes paid thereon, or for anything not above specifically stated.

That notice was duly given to said defendant of said tax and demand made therefor as required by said chapter, but said defendant

protested against said assessment and tax and declined to pay the same; whereupon this information was filed:

Hale & Walcott, attorneys and counsellors at law, Hemenway building, 10 Tremont street, Boston.

Geo. S. Hale. Chas. F. Walcott.

JUNE 27, 1885.

To the Hon. Daniel A. Gleason, treasurer and receiver general and tax commissioner of the Commonwealth of Massachusetts.

SIR: In behalf of the Western Union Telegraph Company we respectfully call your attention to the act of Congress of the United States entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes," approved July 24, 1866, and to the enclosed copy of the acceptance, filed on June 8, A. D. 1867, of said act by said company, certified by the Postmaster General of said United States. The act is now contained in title LXV, sections 5263 to 5269, both inclusive, of the Revised Statutes of the United States. Under this act and the said acceptance the said company respectfully claims and submits that no tax can be legally assessed by authority of said Commonwealth upon said company or its franchises, rights, privileges, or property which is or involves any taxation of or interference with the rights, privileges, or franchises granted by said act and which said company is entitled to and enjoys under said act by virtue of its acceptance thereof to construct, maintain, and operate lines of telegraph over and along post roads of the United States within said Commonwealth, and that a tax upon its corporate franchise assessed in the manner provided by the laws of said Commonwealth, if any portion of the length of its lines constructed, maintained, and operated on post roads of the United States within said Commonwealth is included as part of the length of its lines within said Commonwealth in ascertaining and determining the valuation or sum on which such tax is to be assessed, is not valid under the Constitution and laws of the United States or the constitution of said Commonwealth.

22 And said company further submits that even if said tax is otherwise valid in ascertaining and determining said valution or sum an amount equal to the value of its real estate and machinery located and subject to local taxation without the said Commonwealth ought to be deducted from the value of its shares ascertained as provided by said laws, and that without such deduction said tax is not proportional or reasonable or just or valid under the Constitution and laws of the United States or the constitution of said Commonwealth. Said company respectfully claims and submits that any such tax and any tax assessed in the manner and upon the principles on which a tax was assessed on its franchise in the year 1884 or in like manner theretofore is invalid and does not waive any objection to any tax so assessed or any part thereof, or admit its validity to any extent or in any form, but said company would not refuse to pay for the year 1885 a tax assessed

and ascertained by allowing such deduction and not including as part of the length of its lines in Massachusetts that portion of its lines constructed, maintained, and operated over and along post roads in that State, but otherwise in conformity with the laws of said State, not, however, admitting the validity of such a tax, but it respectfully protests against any tax not so assessed and ascertained as last aforesaid.

And it now submits the accompanying return containing the statement of facts required by said laws, with a view to such an assessment, all by the undersigned, its attorneys, who are,

Very respectfully and truly yours,

GEO. S. HALE, *Of Boston.*
WILLARD BROWN,
Of New York.
By GEO. S. HALE.

WESTERN UNION TELEGRAPH COMPANY,
TREASURER'S OFFICE, NEW YORK, *June* 25, 1885.

Hon. Daniel A. Gleason, tax commissioner of the Commonwealth of Massachusetts.

SIR: I, Roswell H. Rochester, treasurer of the Western Union Telegraph Company, hereby return that on the first day of May, 1885, said corporation held its principal place of business at the city of New York.

Its capital stock was	$80,000,000 00
The whole number of its shares was 800,000.	
The par value of each share was	100 00
The market value of each share was	59 37½
The value of the real estate owned by the corporation without the State of Massachusetts was	3,058,933 82
The value of the real estate owned by the corporation within the State of Massachusetts was nothing.	
23 The total number of miles of line owned or leased was 146,052.60.	
Of which the number of miles (not on post roads of the United States and excluding 2,334.55 miles which were on post roads of the United States) within the State of Massachusetts was 498.50.	
Total property, 800,000 shares, at $59.37½ per share	47,500,000 00
This includes—	
Real estate	3,058,933 82
Two hundred and nine and three-quarters shares held by this company unissued, at $59.37½	12,453 90
Stocks in other companies outside of our system not included in above statement of miles of line	8,773,622 70
Balance value of 146,052.60 miles of line	35,654,989 58
Value at same rate of said 498.50 miles as the valuation of the corporate franchise of said company for taxation under the laws of Massachusetts	121,695 97

This return includes the lines and property of the American Union Telegraph Company, the Franklin Telegraph Company, and the Gold and Stock Telegraph Company, as part of the Western Union lines.

Respectfully yours, R. H. ROCHESTER, *Treasurer.*

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

JUNE 25, 1885.

Then personally appeared the above-named Roswell H. Rochester and made oath that the foregoing return is true to the best of his knowledge, information, and belief.

Before me—

[SEAL.] WM. ARNOUX,
Notary Public, New York and Kings Co's.

FRANCIS S. FISKE,
Special Examiner.

24 This cause was thence continued to the May term, A. D. 1887, when the same came on to be heard upon the pleadings and the report of the examiner, and was fully argued by counsel for the respective parties.

This cause was thence continued under advisement to this present October term, A. D. 1887, when, on the twenty-eighth day of November, the opinion of the court is announced and the following decree is entered:

Final Decree. (*Nov.* 28, 1887.)

COLT, *J.:*

This cause came on to be heard at the last term of this court and was argued by counsel; and thereupon, upon consideration thereof, it is now, to wit, Nov. 28, 1887, by this court found, ordered, adjudged, and decreed as follows:

That the facts set forth in the examiner's report filed in this cause are true.

That on those facts the method of valuation, assessment, and taxation provided by the laws of Massachusetts upon the franchise of the defendant corporation is not, as was claimed and contended by said defendant, illegal and unconstitutional under the constitution and laws either of the State of Massachusetts or the United States—that is to say, either under the Constitution of the United States, article one, section 8, article III, section 2, article VI, amendments V and XIV, Revised Statutes of the United States, sections 5263, 5264, 5265, 5266, 5267, 5268, 5269, including a revision and consolidation of the act of July 24, 1866, chapter 230, ac-
25 cepted by the defendant before the revision of section 221, or under the constitution of said State, part I, art. X, part II, chapter I, section IV, or chapter 13 of its Public Statutes, but was and is in conformity with and authorized by said constitutions and laws, and that therefore the sum claimed by the plaintiff to be due

for taxes, to wit, $10,618.46, be paid to said State by said corporation, with interest thereon, and that an injunction shall be issued out of and under the seal of this court, directed to said corporation and its officers, agents, and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth as aforesaid for taxes as aforesaid shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant as aforesaid within thirty days from the entry hereof.

By the court:

JOHN G. STETSON, *Clerk.*

Upon the entry of the foregoing decree the defendant files the following claim of appeal:

Claim of Appeal. (*Filed Dec.* 3, 1887.)

To the judges of the United States circuit court for the district of Massachusetts:

And now, on this 3d day of December, 1887, into open court comes the Western Union Telegraph Company, by its counsel and
26 solicitor, George S. Hale, and shows to the court that the value of the controversy and of the subject-matter in this suit exceeds the sum of five thousand dollars, exclusive of costs, all of which doth appear of record in the suit by the pleadings therein; and the said The Western Union Telegraph Company does in open court now take an appeal from the final decree rendered and made by this court, and prays that an appeal may be allowed it from the final decree made and rendered in this suit by this court to the Supreme Court of the United States; and further prays that an order be made by this court suspending, during the pendency of such appeal, the injunction heretofore decreed to be issued by this court.

Whereupon, the defendant having given security to prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, the following order of court allowing appeal, etc., is entered:

Order Allowing Appeal, etc. December 3, 1887.

And now, to wit, Dec. 3d, 1887, the defendant in this suit in equity having in open court this day taken and prayed an appeal from the final decree heretofore made and rendered in this suit, it is ordered that said appeal be granted and allowed the said The Western Union Telegraph Company to the Supreme Court of
27 the United States from the final decree heretofore made in this suit, and that pending such appeal the injunction heretofore ordered be suspended.

By the court: JOHN G. STETSON, *Clerk.*

A true record.

Attest: JOHN G. STETSON, *Clerk.*

28 The following is the opinion of the court, in accordance with which the final decree was entered in this cause November 28, 1887:

Opinion of the Court. (*November* 28, 1887.)

Circuit Court of the United States, District of Massachusetts. In Equity.

ATTORNEY GENERAL OF COMMONWEALTH OF MASSACHUSETTS, by Information,
v.
WESTERN UNION TELEGRAPH COMPANY. } No. 2297.

COLT, *J.*:

This is an information filed by the attorney general of Massachusetts under § 54, ch. 13, of the Public Statutes of Massachusetts, to collect a tax claimed to be due, and for an injunction restraining the defendant from the further prosecution of its business until such tax is paid.

The defendant is a telegraph company organized under the laws of the State of New York for purposes of business and profit, and having a capital stock divided into shares. On or about June 12, 1867, the company filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations required by the act of Congress of July 24, 1866, relating to telegraphs. Rev. Stat. §§ 5263–5269. By § 5263 it is provided that any telegraph company organized under the laws of any State shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the
29 United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States.

The information was originally filed in the State court April 27, 1886, and removed to this court by the defendant. On May 1, 1885, the defendant owned or controlled, under lease or otherwise, 146,052.60 miles of telegraph lines, of which 2,833.95 were situated within the State of Massachusetts. In September, 1885, the tax commissioner, in the manner required by the laws of the State, estimated the fair cash valuation of the stock of the corporation, on May 1, 1885, at $47,500,000, and allowed, as credits for shares held by the company unissued and stocks in other companies outside of its system, $8,773,622.70, leaving $38,713,924. The commissioner considered that the valuation of the corporate franchise of the defendant subject to taxation in the State to be $750,952, and he assessed a tax thereon of $10,618.46. More than 2,334.55 miles of the line within the State are over, under, or across post roads, but the commissioner ignored this fact. The defendant has continually transmitted messages over its lines on said post roads between the several departments of the United States Government at rates fixed

by the Postmaster General, as required by the act of July 24, 1866. Rev. Stat. § 5266.

It is impossible for the company to determine what portion of any sums received were for services performed in the State in the transmission through the State or any portion thereof of messages received or delivered out of it, or what portion of any sums received were for services not on lines of said post roads, but approximately seventy per cent. of the receipts were for messages received and delivered out of the State.

The defendant, on May 1, 1885, owned a large amount of
30 real estate subject to local taxation out of the State of Massachusetts, on which there was assessed and paid more than $48,000 of taxes.

In the assessment of the tax herein complained of no allowance or deduction was made for this, and in ascertaining the valuation of defendant's franchise for the purposes of taxation no account was taken of said real estate or buildings or the taxes paid thereon.

The position taken by the defendant is that this tax, levied under ch. 13 of the Public Statutes of Massachusetts, is illegal, first, because of its operation and effect upon a franchise granted by the United States and used for its purposes and benefit; second, because it is a tax upon interstate or foreign commerce; third, because it is in effect levied upon real estate located and taxed in another State.

There is nothing in the act of July 24, 1866, conferring certain privileges on telegraph companies who shall choose to take the benefit of its provisions, which impairs the right of a State to tax the property or franchise of the corporation in the manner exercised by the State of Massachusetts in the present case, nor is such a tax void as repugnant to § 8 of art. 1 of the Constitution, which gives Congress power to regulate commerce with foreign nations and among the several States.

In Telegraph Co. *v.* Texas, 105 U. S., 460, the Supreme Court held a State statute imposing a specific tax on each message which it transmitted beyond the State, or which a public officer sends over its lines on business of the United States, was void so far as it was a tax on interstate business or a tax by a State on the means employed by the United States to execute its constitutional powers. It will be observed that this was a direct tax on each message sent out of the State as well as a direct tax on messages sent by the Government.

31 In the present case, however, the tax is imposed upon the shares of capital stock which represent the property and franchise of the corporation. Every tax on the property or franchise of a telegraph company may operate to increase the cost of messages sent, but that does not make such a tax invalid. In the case just referred to, Chief Justice Waite, speaking for the Court, says: "The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a Government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same

other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State or sent by public officers on the business of the United States." It was this last question that was determined in the negative.

In the Delaware Railroad tax case, 18 Wall., 206, an act of the Legislature of Delaware imposing a tax quite similar to the one now complained of was held not to conflict with the power of Congress to regulate commerce. The Court in that case observes: "The State may impose taxes on the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property, and the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." The question of what constitutes a tax upon foreign or interstate commerce has frequently come before the Supreme Court for adjudication, and I find no case which sustains the view taken by the defendant in this case. The question is carefully reviewed in the recent cases of Fargo *v.* Michigan, 121 U. S., 230, and Philadelphia Steamship Co. *v.* Pennsylvania, 122 U. S. 326.

Sec. 40, ch. 13, of the Public Statutes of Massachusetts provides that every corporation embraced in the provision of § 38 shall pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock at a certain rate determined as therein set forth, deducting in the case of railroads and telegraph companies whose lines extend beyond the limits of the Commonwealth such portion of the whole valuation of their capital stock as is proportional to the length of that part of their line lying without the Commonwealth; and also an amount equal to the value as determined by the tax commissioner of their real estate and machinery located and subject to local taxation within the Commonwealth; in case of other corporations, an amount shall be deducted equal to the value of their real estate and machinery subject to local taxation wherever situate. The deductions in the case of corporations generally of all real estate and machinery wherever situate, and in the case of railroad and telegraph companies whose lines extend beyond the limits of the Commonwealth, of only the real estate and machinery lying within the State, is a question of legislative discretion, and no valid ground has been suggested upon which this court for this reason has a right to declare a tax so levied invalid in whole or in part. I think a decree should be entered for the complainant, and that an injunction as prayed for should be granted, unless the amount taxed is prayed by the defendant within thirty days from the entry of a decree in the cause.

Decree for complainant.

33 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
Massachusetts District, } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record in the cause in equity entitled, No. 2297, Attorney General of Commonwealth of Massachusetts, by information, *v.* Western Union Telegraph Company, in said circuit court determined, and of all proceedings therein, and of the opinion of the court therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this tenth day of December, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

34 *Bond to Party on Appeal.*

Circuit Court of the United States, District of Massachusetts.
In Equity.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,
by Information,

against

THE WESTERN UNION TELEGRAPH COMPANY.

Know all men by these presents that we, The Western Union Telegraph Company, a corporation of the city of New York, principal obligor, Russel Sage, of the city of New York, sureties, are held and firmly bound unto the Commonwealth of Massachusetts in the sum of twenty-five thousand dollars, to be paid to the said Commonwealth of Massachusetts or its assigns; to which payment, well and truly to be made, the said principal obligor and the said sureties bind themselves, their successors, and their heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with the seals of the said principal obligor and sureties and dated this thirtieth day of November, in the year of our Lord one thousand eight hundred and eighty-seven.

35 Whereas, lately, at a circuit court of the United States for the district of Massachusetts, in a suit in equity depending in said court between The Attorney General of the Commonwealth of Massachusetts, by information, against the said The Western Union Telegraph Company, a final decree was rendered against the said The Western Union Telegraph Company, and the said The Western Union Telegraph Company having taken an appeal to the

Supreme Court of the United States to reverse the final decree in the aforesaid suit in equity, which said appeal was allowed—

The condition of the above obligation is such that if the said The Western Union Telegraph Company shall prosecute its said appeal to effect and answer all damages and costs if the said The Western Union Telegraph Company fail to make its said appeal good, then the above obligation to be void; else to remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY,
By NORVIN GREEN, *Pres't.* [SEAL.]
A. R. BREWER, *Secretary.*
RUSSELL SAGE. [SEAL.]

Sealed and delivered in presence of *us*—
[SEAL.] WM. ARNOUX,
Notary Public, New York & Kings Cos.

Approved:
LE BARON B. COLT,
U. S. Circuit Judge.

36 A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

Endorsed on cover: Massachusetts C. C. U. S. No. 1325. The Western Union Telegraph Company, appellant, *vs.* The Attorney General of the Commonwealth of Massachusetts. Filed December 17, 1887.

125-50

No 1325

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

ATTORNEY-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, BY INFORMATION, Appellee,

v.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant.

MOTION FOR ADVANCEMENT.

Supreme Court of the United States.

OCTOBER TERM, 1887.

ATTORNEY-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, BY INFORMATION, *Appellee*,

v.

THE WESTERN UNION TELEGRAPH COMPANY, *Appellant*.

MOTION FOR ADVANCEMENT.

The appellee above mentioned, representing the Commonwealth of Massachusetts (a party directly interested in the subject matter of said suit), now moves the Court to advance said cause upon its calendar, and to set down the same for argument upon some day in March, 1888, to be fixed by the Court.

STATEMENT.

This is a suit brought by the Attorney-General of Massachusetts under its Public Statutes, Chap. 13, Sect. 5, at the relation of its Treasurer, to recover a tax (assessed on the defendants under said chapter), the legality of which is denied. The question is whether the system of taxation, under which this tax is assessed as a franchise tax, is constitutional and legal under the Constitution and laws of the United States and of the State.

The defendant is a corporation of the State of New York, and in 1867 accepted the provisions of the Act of Congress of July 24, 1866 (Revised Statutes, Sect. 5263 *et seq.*), as follows: —

"AN ACT to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States: *Provided*, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful use in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption, through which its said lines of telegraph may be located, as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"SECT. 2. And be it further enacted, that telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

"SECT. 3. And be it further enacted, that the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person. *Provided, however*, that the United States may, at any time after the expiration of five years from the date of the passage of this act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"Sect 4. And be it further enacted, that before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General, of the restrictions and obligations required by this act." 14 Stat. 221; Rev. Stat., Sect. 5263 *et seq.*

The tax in question is declared by the statute of Massachusetts to be "a tax upon its corporate franchise," and the defendants claim that the tax in controversy is unconstitutional and void as in conflict with the act of Congress above stated, and with the Constitution of the United States and of Massachusetts, as claimed by the defendant in the court below.

The tax directly involved is that for the year 1885; but the defendant has declined to pay the taxes for the years

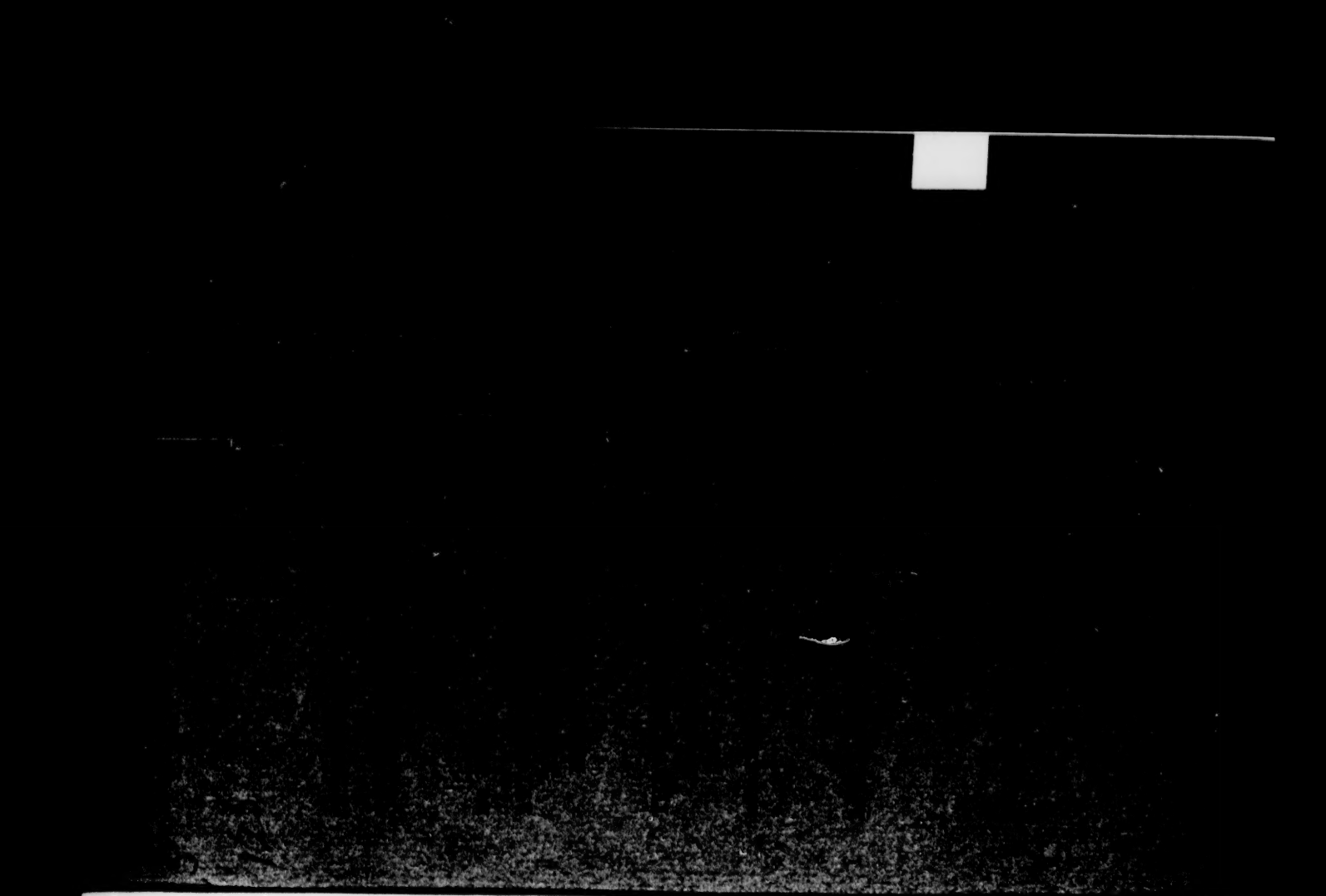
1886 and 1887, and will probably refuse to pay its taxes, hereafter accruing, until the decision of this cause.

The case involves the validity of any tax assessed under the tax system of Massachusetts upon telegraph companies, who have accepted the said act of Congress, and have constructed and operate lines on post roads in Massachusetts; and it is for the interest of the State that a speedy decision should be reached.

We are informed by counsel for the defendant, that similar questions are involved in cases pending in other States, and that a decision in this case upon the merits of this question will probably be decisive of those cases, and prevent their reaching the dockets of this court.

Two other suits similar to this have already been commenced, involving in all about forty thousand dollars ($40,000). Should it be determined by this Honorable Court that under existing laws of the State of Massachusetts, this corporation may not be taxed, it is of importance to the State that the fact be seasonably known, in order that, by appropriate legislation, any defect in the statute may be remedied, to the end that the property of said corporation shall bear its appropriate burden of taxation: or, if it shall appear that, by reason of any unanticipated effect of the aforesaid arrangement between the United States and said corporation, in pursuance of said act of Congress, the several States are precluded from enforcing against said corporation a tax upon its property in pursuance with provisions heretofore operative, it is of importance that such construction be known at once, that a remedy, by way of possible Federal legislation, may be had, to the end that the vast property of said corporation may not for a number of years wholly escape taxation.

H. C. Bris
asst Atty Gen



Supreme Court of the United States.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 1324.

ATTORNEY-GENERAL OF THE STATE OF MASSACHUSETTS, BY INFORMATION, AT THE RELATION OF THE TREASURER, IN EQUITY,

v.

THE WESTERN UNION TELEGRAPH COMPANY, *Appellant.*

October Term, 1887.

February, 1888.

APPELLANT'S BRIEF OF POINTS AND AUTHORITIES.

This is an information by the Attorney-General, under the 54th Section of Chapter 13 of the Public Statutes of Massachusetts (Record, pp. 12, 13, 19–21), to collect a tax claimed to be due, as assessed under and in accordance with the provisions of Sections 42, 40 and 38, of that chapter, originally brought in the Supreme Judicial Court of that State, and removed into this court by the defendant.

The information also prays for an injunction, restraining the further prosecution of its business by the company, as provided by said Section 54, until such tax is paid.

The defendant is a telegraph company organized under the laws of the State of New York, which duly filed its acceptance of the Act of Congress of July 24, 1866, with the Postmaster-General on the 12th of June, 1867. (Record, pp. 12, 13.) It owns, controls, and uses, in the transaction of its business, under lease or otherwise, lines of telegraph

within the Commonwealth of Massachusetts, and out of the United States, and also owns works, structures, real estate and machinery subject to local taxation and taxed without said Commonwealth (Record, p. 14), and none in said Commonwealth (Record, p. 11).

The whole length of all these lines was 146,052.60 miles, of which there was within said Commonwealth 2,833.05 miles, and on post roads and waters of the United States therein a length of over 2,334.55 miles. (Record, pp. 13, 14.) And in estimating and assessing the tax demanded under the laws of Massachusetts, the officers of that State have followed the course thereby prescribed, unless and except in not deducting from the total valuation, and in including in the valuation ($38,713,924, Record, p. 13) of the stock or franchise assessable in that State the lines on such post roads or waters, and the real estate (over $3,000,000, Record, p. 14) taxed in other States.

The questions to be determined arise under the following constitutional or statutory provisions: —

Constitution of the United States, Art. I., Sect. 8; Art. III., Sect. 2; Art. VI., Amendments V. and XIV. Revised Stats. of United States, Title LXV., p. 1019. Sects. 5263–4–5–6–7–8–9, including a revision and consolidation of the Act of July 24, 1866, Chap. CCXXX. . . . 14, U. S. Stats. at L., p. 221, and later statutes; the Act, as stated, having been accepted by the defendant as early as June 12, 1867, before the revision.

Title VI., Department of War, U. S. Rev. Stats., Sect. 221, p. 36.

Constitution of Massachusetts, Part I., Art. X.; part II., Chap. 1, Sect. 1, Art. IV.

Public Stats. of Massachusetts, Chap. 13.

Taxation of Corporation Franchises, Sects. 38, 39, 40, 41, 42 and 53, 54, 55, 56.

And the main questions now presented, not waiving other illegalities or irregularities, are

(1.) Whether this method of taxation and assessment and valuation is illegal by reason of its operation and effect either upon a franchise granted by the United States, and used as an agent for its purposes and benefit, or upon interstate and foreign commerce.

(2.) Or because it is in effect in part levied on real estate or property located and already taxed in another jurisdiction.

I. Certain propositions may be laid down as established by the final decisions of the Supreme Court of the United States. Telegraph companies, which have accepted the Act of Congress (above mentioned), are, "as to government business," "government agencies," and so far as a State tax on a company "is on [or affects] the means employed by the Government of the United States to exercise its constitutional powers" it is void.

Western Union Tel. Co. *v.* Texas, 105 U. S. (15 Otto) 451.
Osborn *v.* Bank of the U. S., 9 Wheaton, 738.

A tax, "not on the property of" the company, "but upon one of its operations; upon its right to exist as created," "a direct impediment in the way of a governmental operation performed through the company" as an agent; "a tax on the operations of an instrument employed by the Government of the United States to carry its powers into execution"; "upon the operations of the agent acting for the Government"; "upon the franchises or the rights of the company to exist and perform the functions for which it was brought into being," is illegal and void. "The States may not levy taxes,

the direct effect of which shall be to hinder the exercise of any powers which belong to the National Government."

Union Pacific R. R. Co. *v.* Peniston, 18 Wallace, 5.

In that case, while the Court sustains a tax on the Union Pacific Railroad Company, it is said that the tax sustained "is laid upon the property of the railroad company" . . . "It is not imposed upon the franchises of the right of the company to exist and perform the functions for which it was brought into being." . . . "It is exclusively the real and personal property of the agent," and one of the three dissenting judges (Mr. Justice Bradley) says: "The franchises of the right of way, and materials of track, cannot be taxed, because they are essentially connected with and form a part of the powers, faculties and capital by which the national purposes of the organization are accomplished" And there is certainly nothing in the opinion of the Court showing that franchises derived from the United States could be interfered with by taxation.

The power of taxation by a State involves and includes the power of destroying the thing taxed, and does not exist as to anything which the taxing power cannot destroy.

McCulloch *v.* Maryland, 4 Wheaton, 316, 427, 431, 433, 436.

People *ex rel* Bank of Commerce *v.* New York, 2 Black, 620.

Weston *v.* Charleston, 2 Peters, 449, 466, 468.

The grant of the right, privilege or franchise to construct and maintain lines of telegraph on post roads of the United States by the Act of July, 1866, clearly cannot be interfered with or limited by any State by prohibition. It is given to all corporations organized under the laws of any State. And

one State cannot exclude a corporation organized under the laws of another State from prosecuting its through or local business over and by its use of lines on post roads, if that corporation has accepted the Act of Congress.

Pensacola Tel. Co. *v.* West. Un. Tel. Co., 96 U. S. 1.
Hewett *v.* West. Un. Tel. Co., 14 Washington Law Rep., pp. 194, 211, March 27 and April 3, 1886.

A physician licensed by a State to practice anywhere therein cannot be required to pay a license imposed by a city, also.

The Mayor, etc., *v.* Charlton, 36 Georgia, 460.

It seems to be now settled that any statute of a State, intended to regulate, tax or restrict the transmission of persons, property or messages from one State to another is not valid, but void as to the whole transit, *within* as well as *without* the State.

Wabash, etc., Railway Co. *v.* Illinois, 118 U. S. 551.

By a very recent decision, —

Fargo *v.* Michigan, 121 U. S. 230,

it is determined that the States cannot, under the guise of a tax on business within their borders, impose a burden on commerce among the States, when the business itself is interstate commerce.

Nor can a State by a *"privilege tax"* on cars, not owned by a railroad company, used upon its road, tax the privilege of carrying passengers in such cars through the State.

Pickard *v.* Pullman Southern Car Co., 117 U. S. 34.

The Court will penetrate through the form or name to the substance of the imposition.

This right, therefore, cannot be limited or interfered with by taxation. Nor can the transaction of interstate or foreign business or commerce by the defendant's agency, or its use, as a government instrumentality, of the right given to it, be so interfered with or limited. And the only question on this branch of the case is whether the Massachusetts tax or act operates as, or results in, such an interference or limitation in any form or to any extent or degree.

It is clear that the tax in question cannot be defended under the decisions of the Massachusetts Supreme Court as a tax on property. It is declared and decided to be a tax on its corporate franchise.

Pub. Stats., Ch. 13, § 40.

And in Massachusetts, like other similar assessments, can be sustained only as an excise or franchise tax.

Manufacturers Ins. Co. *v.* Loud, 99 Mass. 146.
Hamilton Manfg. Co. *v.* Massachusetts, 6 Wall. 632 s. c. 12 Allen, 298.
Prov. Inst. for Savings *v.* Mass., 6 Wall. 611.
Portland Bank *v.* Apthorp, 12 Mass. 252.
Commonwealth *v.* People's Five Cents Savings Bank, 5 Allen, 428, 431.

An excise is a fixed, absolute and direct charge, based on no rule of apportionment or equality whatever . . . and *ex vi termini* cannot, under constitutional requisitions for proportion, uniformity or equality, be assessed at different rates or amounts on different descriptions of property, or alone on

any one class of property, while others are differently assessed.

Desty on Taxation, Vol. I., pp. 3, 28.
Cooley on Taxation, 2d Ed. 4.

The rights and privileges granted by the Government of the United States to make use of the post roads, etc., subject to its control, and for its use, are certainly franchises. "For franchises are special privileges conferred by Government upon individuals which do not belong to the citizens of the country, generally of common right."

Taney, C. J., in Bank of Augusta *v.* Earle, 13 Peters, 519, 595.

The company occupies the position of an instrument for foreign and interstate commerce and of a government agency for the transmission of messages on public business, and uses this franchise, right or privilege for such commerce and for such business.

Western Union Telegraph Co. *v.* Texas, 105 U. S. 460, 464.

The fact that it also uses it for private or local business does not authorize a burden imposed by a State tax which operates without discrimination upon that agency or franchise in either or both uses.

The People *ex rel* Bank of Commerce *v.* New York, 2 Black, 620.
Osborn *v.* Bank of the United States, 9 Wheaton, 738.
West. Union Telegraph Co. *v.* Texas, 105 U. S. 460.

It was considered in The People *ex rel* Bank of Commerce *v.* New York, 2 Black, 620, *supra*, that a tax bearing on United States stock was invalid, whether "imposed on the

stock *eo nomine*," or whether it (the stock) was "taxed in the aggregate of the taxpayer's property."

Marshall, C. J., says in

Osborn *v.* Bank of the United States, 9 Wheaton, 738, 877:

"Indeed, a tax bears upon the whole machine, as well upon the faculty of collecting and transmitting the money of the nation, as on that of discounting the notes of individuals. No distinction is taken between them."

That, it is submitted, is *precisely our case.*

And a tax on the franchises by length of lines, including those on post roads, is like a general tax on all messages, thus including, without distinction, messages sent out of the State and Government messages.

West. Union Tel. Co. *v.* Texas, 105 U. S. 460.

Is it possible to escape the conclusion that the tax does operate on a franchise, right or privilege granted by the United States or upon foreign and interstate commerce, and thus limit and interfere with one or both? It is not a tax on the mere franchise of corporate existence, but on all the franchises enjoyed and used within the taxing jurisdiction. As Chief Justice Bigelow, of Massachusetts, delivering the the opinion in the Court in

Commonwealth *v.* Hamilton Manfg. Co., 12 Allen, 298, p. 305, declared:

"It is the capital stock considered as a franchise, embracing the whole corporate organization with all its rights and privileges, of which the shares are constituent fractional parts, that forms the subject matter on which the tax or assessment was imposed." And further, he speaks of "the

estimate put . . . also on the rights, privileges, and present or prospective results of the corporate organization and business, or its franchises" (p. 305).

Again, it has been distinctly declared by the same Court that "the existence and organization of the corporation, the functions and capacities with which it is endowed by the law creating it, are" not "alone what constitute the franchise or commodity which is the subject of the tax or excise imposed," etc.,

> Att'y-General *v.* Bay State Mining Co., 39 Mass. 148, 152;

but that the subject matter of taxation includes "the exercise of all the rights and privileges enjoyed by the corporation in the conduct of its business" (p. 153).

And "when the exercise of corporate franchises authorized by the State is extended beyond the limits of the State, as in railroad and telegraph lines, the taxes are apportioned accordingly," p. 153. Clearly, then, it is the exercise of this corporate franchise of erecting and maintaining lines on post roads (which the State of Massachusetts cannot forbid) which is estimated and included in the valuation of the franchise on which the tax is assessed, and by apportionment limited or extended according to the very length of those lines on post roads, etc.

The more extensive is the exercise in Massachusetts of a paramount right which it cannot forbid, the larger is the amount which that State demands as a condition of enjoying and exercising that right. "Exclusion is the remedy to enforce compliance" (Att'y-Gen. *v.* Bay State Mining Co., 99 Mass. 163) sought in the case at bar. And in the case we are not citing it is declared that the statute is founded on that right of exclusion.

The leading decision in Massachusetts,

Portland Bank *v.* Apthorp, 12 Mass. 256,

and subsequent cases in that State, sustaining the Massachusetts franchise tax, are placed on the ground that the right to carry on the business or employment assessed is "a commodity, convenience or privilege which the Legislature has, by contemporaneous construction of the Constitution, assumed the right to sell at a reasonable price";

"Both as to domestic corporations, which derive their authority to exercise the franchise taxed by grant from the State, and as to foreign corporations, which are permitted to exercise the same franchise here, by the comity of the State, upon such conditions as it sees fit to prescribe." (Morton, C. J., in Connecticut Mut. Life Ins. Co. *v.* Commonwealth, 133 Mass. 161, 167.)

"The right to levy excises upon franchises has never been extended further than to corporate franchises specially granted by the Government, or enjoyed and exercised by its permission."

Gleason *v.* McKay, 134 Mass. 419, 425.

But in this case the right of exclusion clearly does not exist, and the defendant does not purchase the privilege of the State, but of a paramount authority. This distinction is clearly pointed out, adopted and maintained by the Court in Fargo *v.* Michigan, 121 U. S. 230, 242, 243, and Gloucester Ferry Co. *v.* Penn. 114 U. S. 196, 205, 206, 211; Phila. St. Co. *v.* Penn. 122 U. S. 326, 342–344.

Turning now to the provisions of the Massachusetts Acts, let us further consider the manner in which the tax does interfere with the rights granted by the United States, and with interstate commerce and government messages.

It has been shown to be a tax on the franchises of the company, and it seems enough that the right in question is one of them: but, further, the Supreme Court of the United States have considered, in construing the law in regard to the taxation of national bank shares, that the valuation was as important as the rate, and that, if by a comparative inequality of valuation, a greater rate was in fact imposed, although nominally at the same percentage, it would be a violation of the law which forbade a higher rate.

In the language of Mr. Justice Miller, in

People, etc., *v.* Weaver, 100 U S. (10 Otto) 539:

"This valuation, then, is part of the assessment of taxes. It is a necessary part of every assessment of taxes which is governed by a ratio or percentage."

In the present case, the first step is to ascertain the true market value of the shares of the corporation, and to estimate therefrom the fair cash valuation of all the shares of its stock, which is to be taken as the value of its corporate franchise.

But it is not pretended that Massachusetts can tax the company on all this valuation. A further step must be taken to determine how much of that valuation shall be apportioned to Massachusetts as the value of the subject of taxation within its jurisdiction, and this is done by taking the same fraction of the whole as the length of all the lines in that State is of the whole length of all the lines. Every mile of line in Massachusetts, therefore, enhances this value and increases the tax. Every mile of line the company adds to the length on post roads, etc., increases its burden, whatever may be the uses made of that length. Every extension of its means for transmitting interstate messages or government business increases its tax, although it may be used

solely for those purposes, and without regard to the question whether it its used for any other purpose.

See Achison *v.* Huddleson, 12 Howard, 293, where a law of Maryland, imposing "a tax upon the proprietor of a four-horse coach which carries the mail, making the amount of that tax depend on the number of passengers carried," was held invalid under the compact as to the Cumberland road. Here the tax is on the proprietor of a franchise granted by the United States to carry a telegraphic mail, the amount of which depends on the number of miles over which it uses that franchise. There it was argued that the tax was on the passengers who paid fares, but which the Court replied the proprietor was bound to carry. Here it may be argued that the tax is on the use of the franchise for profit: but there is no distinction (even if that view were to be considered) made here between the uses of the franchise.

It is obvious that a valuation in proportion to the length of lines in and out of the State may be far from representing the real proportion of value or property *in* the State; and while it may not be subject to control when it is made in the exercise of an arbitrary and unlimited power over property, persons or corporations, wholly within the limits of that power in all respects, or its own creatures, yet when the application of a limited power thus presses directly upon rights which that power cannot control, it certainly cannot be sustained.

It is no answer to say that it is merely a mode of valuing a franchise, when that valuation includes a franchise which the valuing authority cannot control, and increases the burden in proportion to the use of that very franchise.

Nor can the tax be sustained as an arbitrary valuation of the privilege or franchise of doing a purely local business within the State. As the Court say, in Fargo *v.* Stevens *ubi*

supra: "The proposition that the States can, by way of tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations, has often been set up as a defence to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the States or with foreign nations, the constitutional provision cannot thereby be evaded; nor can the States, by granting franchises to corporations engaged in the business of transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce either by taxation or in any other way."

Again, as the Court say, in Pensacola Tel. Co. *v.* West. Un. Tel. Co. *ubi supra*: "The Statute of July 24, 1866, 14 Stat. at L. 221, in effect, amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national Government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress *over the postal service*. It gives no foreign corporation the right to en-

ter upon private property without the consent of the owner, and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

Postal service is not limited to service between States, but includes service from place to place within the State, and this franchise is not under the control of the State by taxation or otherwise. The company has the right under the statute "to construct, maintain and operate lines of telegraph . . . over and along *any* of the military or post roads of the United States," without limitation to those which pass out of one State into another.

In the recent case of Robbins *v.* Shelby Taxing District, 120 U. S., pp. 480, 493, the Court, by Mr. Justice Bradley, declares "that the only way in which commerce between the States can be legitimately affected by State laws, is when . . . State provides, etc. . . . or . . . does those things which may otherwise incidentally effect commerce such as . . . the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under the authority of the constitution and laws of the United States, and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. But in making such internal regulations, a State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon

property imported into the State from abroad, or from another State, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject."

Or, to consider another aspect of the case: —

It is perfectly clear, from what has already been said, that the tax in question is not a tax upon the taxable property of the company — its poles, wires and instruments.

It may be true that a State can tax a franchise granted by the Federal Government, if it be assessed and taxed as property, bearing the same burdens as and no more than other property having a money value. The true distinction, doubtless, lies in the difference between imposing the burden on the property value of the franchise and imposing it upon the "operation of the franchise," which is made the Federal machine, for the latter is a "brake" upon the movements of the machinery which may stop its motion.

But the tax in question in this case, which is declared by the statute to be "upon the corporate franchise" (Mass. Pub. Stats., Chap. 13, §§ 38, 40–42) is not imposed upon the franchise as property. It is, rather, charged as an excise — as a "price" for the "commodity," convenience or privilege which the Legislature has sold. (Mass. Const., Part II., Chap. 1, § 1, Art. 4.)

Portland Bank *v.* Apthorp, 12 Mass. 252, 256.

If, therefore, the State does not sell this "commodity," it cannot exact the "price," and as the company in this case does not get its franchise to be a corporation from Massa-

chusetts, but from New York, and gets from the United States its rights or franchise to enter the State of Massachusetts and "construct, maintain and operate lines of telegraph" therein, it would seem that the taxing statute, by its own terms, cannot operate in this case.

Is there, then, any franchise in the possession of the Western Union Telegraph Company which was granted or can be refused or taxed by the Commonwealth of Massachusetts, distinct and separate from the operation of an instrumentality created by Congress in the discharge of a Federal duty or the exercise of a Federal right?

This leads us to an inquiry into the character of this "instrumentality" created by Congress.

The title to the Act of Congress of 1866 declares the purpose to be, *inter alia*, "to secure to the Government the use of the same [telegraph lines] for postal . . . purposes." Any telegraph company coming under the statute is authorized to "maintain and operate lines of telegraph . . . over and along any of the . . . post roads of the United States," clearly not confining it to the post roads which cross a State line.

This Court, considering this statute, in

Pensacola Tel. Co. *v.* W. U. T. Co., 96 U. S. 7,

declared that, as "post-offices and post roads are established to facilitate the transmission of intelligence," the power granted by the Constitution to Congress to establish post-offices and post roads extends to the adoption of the electric telegraph as one of the instrumentalities for that service.

"The statute of July 24, 1886 . . . substantially declares in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens," that the telegraph "shall, so

far as State interference is concerned, be free." "To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service."

Did not the Court, in effect, declare that a telegraph company acting under this statute, when engaged in "transmission of intelligence" by telegraph, was acting as a Federal instrument in the postal service, so that each time it sent a telegram over its lines it did in legal effect carry a letter for the Federal Government, precisely as a railroad carries a letter in the more familiar postal service?

Is not this the "use" of the lines which the title declares it is designed "to secure to the Government"? If so, and this be the true basis and operation of this statute, than it is immaterial whether the telegram be sent across a State line or be sent from one point to another within a State; for the postal power of Congress extends as clearly to the latter case as to the former. It thence follows that the telegraph business done by the Western Union Telegraph Company in the State of Massachusetts which begins and ends within the State, not crossing a State line, is done under the Federal franchise, and not under any grant or permission or license of the State. As the company does no other business than the transmission of intelligence (*i. e.*, is engaged solely in the postal service), it is apparent that it possesses and exercises in Massachusetts no franchise excepting that which was created by Congress for the Federal purpose, and the tax imposed by the State upon "the corporate franchise" of the corporation can, in this case, only fall upon the Federal franchise.

It will not do to say in reply, that though nominally on the franchise the tax is actually on the capital stock repre-

senting the property in the State. It will not do, because the statute expressly declares that the tax is "upon its franchise, at a valuation thereof equal to the aggregate value of the shares in its capital stock," and because the courts of Massachusetts have repeatedly declared that the tax is not laid upon the property represented by the capital stock, and that if it were so it would be void. In this view and judgment this Court has joined.

Hamilton Man. Co. *v.* Massachusetts, 6 Wall. 632.
Prov. Inst. for Savings *v.* Massachusetts, 6 Wall. 611.

II. The omission to deduct from the total valuation the real estate located and subject to local taxation in other States, renders the tax excessive and invalid. It is to be observed that the defendant is not, as is said in

Minot *v.* Phil. Wil. & Balt. R. R. Co., 18 Wall. 206,

"an entity existing under its laws" in the State imposing the tax, and, under the authorities already cited, cannot be excluded from the State.

As declared in that case, if the tax here imposed does in fact fall on the property out of the State, it is invalid. In that case, the tax was on income and not on property, and the apportionment, sustained according to length in the State, was of that *income* tax. Here the total stock is first valued. This valuation obviously includes the value of the whole property, wherever situated, and must be based on that, so that the total must include real estate to a large amount in other States, as well as defendant's interest in ocean lines. And it is obvious that any fraction of the $38,713,924 must include a fraction of this real estate and interest, so that the amount taxed in Massachusetts ($750,952, Record p. 14) in-

cludes a portion thereof, if this is to be treated as substantially a tax on the property of the company.

A dilemma is thus presented. Either the tax is or is not a tax on property. If it is, as it is measured by the market value of the stock representing the whole of the property, any apportionment must include a portion of that whole, and be a tax on everything included in it. If it is not a tax on property, but a burden or exaction imposed in the exercise of an alleged right of exclusion, then, for the reasons before given, it is invalid as a burden on the exercise of a right which the State imposing the tax cannot limit or exclude.

But in addition to this, if this is a tax on property, the refusal to make any deduction for the real estate is, when the Massachusetts statutes are considered in connection with the Constitution of that State, in violation of the provisions which require "proportional and reasonable assessments, rates and taxes upon all the inhabitants of and persons resident and estates lying within said Commonwealth.' (Const. of Mass., Part Second, Chapter I., Art. IV.)

By Section 40 of Chapter 13, Public Statutes of Mass., in taxing corporate franchises, a deduction is to be made from the total valuation — of the shares — "in case of railroads and telegraph companies whose lines extend beyond the limits of the Commonwealth," of "an amount equal to the value . . . of their real estate and machinery located and subject to local taxation *within the Commonwealth*." While in case of other corporations included in Sect. 38 . . an amount equal to to the value, as determined by the tax commissioner, of their real estate and machinery, subject to local taxation *wherever situated*," is deducted. The "other corporations" thus favored are all the corporations organized under the laws of this State, except banks (otherwise taxable), companies for mining coal, etc., etc., building railroads and telegraphs

The tax being illegally assessed cannot be reassessed, corrected, and made valid under the laws of Massachusetts in conformity with the Constitution of that State, or (even if ducted in fixing the value of their stocks or franchises for taxation; while the Western Union Telegraph Company is denied that privilege, and forced to pay a tax on a valuation including property already taxed in another jurisdiction, and is thus denied "the equal protection of the laws" secured to it as a "person" within the jurisdiction of Massachusetts, by the fourteenth amendment of the Constitution of the United States. Its franchise is valued differently from, and higher than other franchises. Nor is this corrected by taking the proportion of length of lines in and out of the State. A corporation with one mile in another State may have an utterly disproportionate amount of real estate, situated and heavily axed there.

In Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 197, above cited, a tax on the capital stock of a New Jersey corporation, based on its appraised value, was imposed by Pennsylvania and sustained by the State court. The business of the company consisted in transporting passengers between the States, and its only property in Pennsylvania was the lease of the wharf there, and the Court held the tax invalid, declaring (p. 205) that "the existence of power in a State to impose a tax upon the capital of all corporations engaged in foreign or interstate commerce for the use of such places would be inconsistent with, and entirely subversive of the power vested in Congress over such commerce." In like manner the defendant is engaged in such commerce, and uses its lines over post roads for that purpose. The State does not claim to tax any property other than its stock, and increases that tax for every such line. Can that be consistent with the power of Congress to establish these lines for commerce or its own purposes?

out of the State, and except corporations like the American Bell Telephone Company specially taxed under charters. The result is, that these Massachusetts corporations have the value of all their real estate, etc., *out* of the State detaxation of bank shares is violated if one taxpayer is allowed to deduct from his assets debts due from him, and the holder of such shares is not allowed to deduct such debts from the value of the shares.

People *v.* Weaver, 100 U. S. 539.

So the tax assessed on the Western Union Telegraph Company, as a tax on its estate "lying within said Commonwealth," is not proportional to the tax on the estate "lying within said Commonwealth" of the Massachusetts corporations, if they are allowed deductions therefrom refused to that company.

The defendant, within this provision, and within said fourteenth amendment, is a person, and entitled to protection against unequal taxation.

County of Santa Clara *v.* Southern Pacific Railroad, 118 U. S. 294.

County of San Mateo *v.* Southern Pacific Railroad, 13 Fed. Rep. 722, 747, 748, 762.

In that case, the deduction of mortgages from the property of individuals, and not of railroads, was held a violation of the amendment.

And this assessment being laid upon the stock or franchises as a unit, and including property not legally assessable, is invalid.

County of Santa Clara *v.* Southern Pacific R. R. Co. (*ubi supra*).

The Supreme Court of the United States hold that the equality required by Sect. 5219 of the Revised Statutes in the that is not violated) of the United States, but is wholly void, and the bill must be dismissed.

Libby *v.* Burnham, 15 Mass. 244.
Stetson *v.* Kempton, 13 Mass. 272

Public Statutes, Ch. 13, Sect. 24, does not authorize the collection of any separate portion of the taxes under sections 40 and 42, and the whole tax stands or falls together.

This is not an application by the defendant for an injunction or other proceeding, but an attempt by the taxing power to enforce its assessment which it is submitted is illegal, by collecting "said sum" "due for taxes" "with interest," and to prevent the defendant from exercising its rights to carry on interstate commerce, or to serve the United States until the payment of such illegal exaction.

Willard Brown

GEO. S. HALE,
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For the Appellant.

125-330

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887. FEBRUARY, 1888.

No. 1328

ATTORNEY-GENERAL OF THE STATE OF MASSACHUSETTS, BY INFORMATION, AT THE RELATION OF THE TREASURER, IN EQUITY,

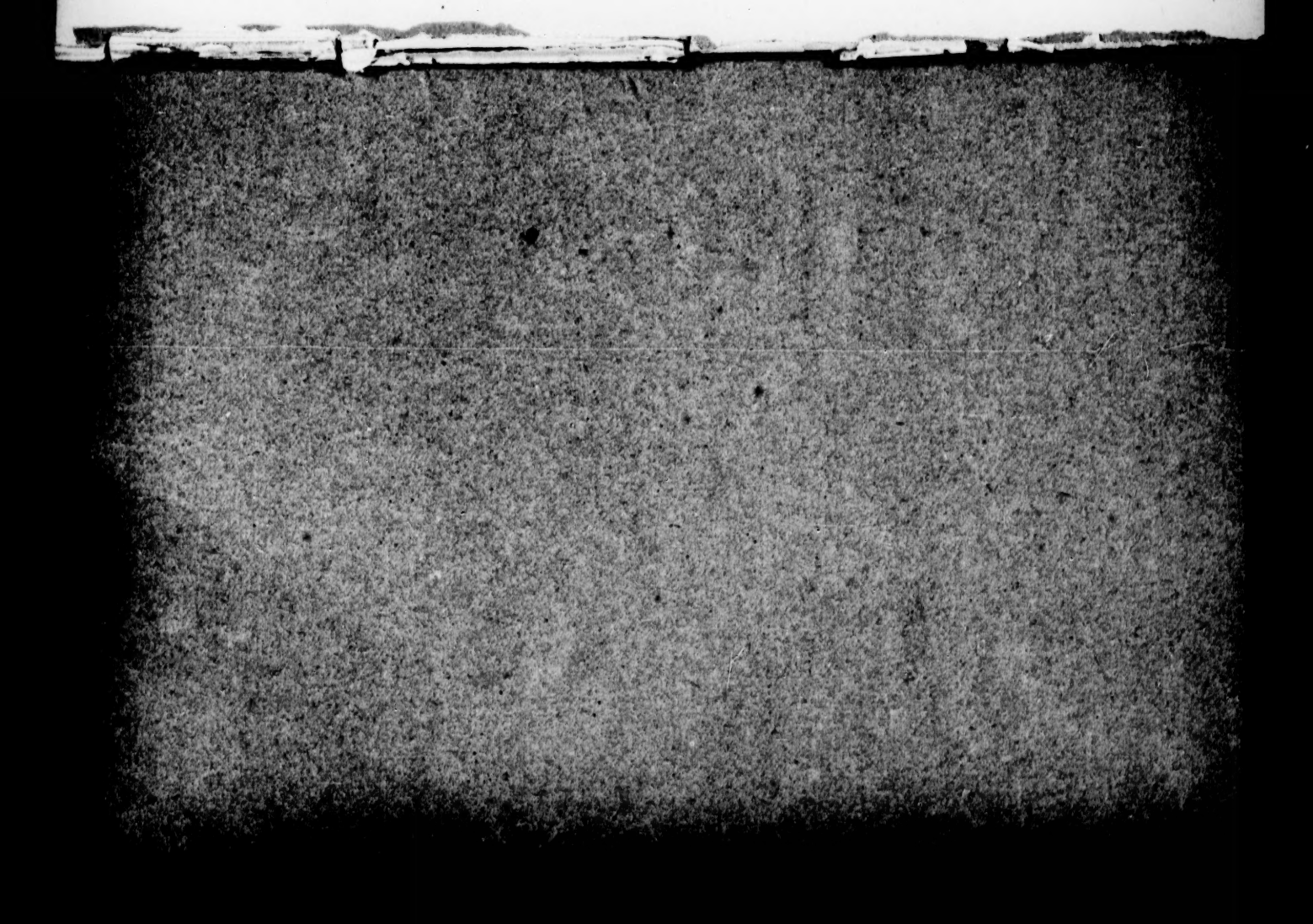
v.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS.

ANDREW J. WATERMAN, Attorney General,
HENRY C. BLISS, Assistant Attorney-General,
for the Commonwealth.



Supreme Court of the United States.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

NO. 1326

ATTORNEY-GENERAL OF THE STATE OF MASSACHUSETTS, BY INFORMATION, AT THE RELATION OF THE TREASURER IN EQUITY,

v.

THE WESTERN UNION TELEGRAPH COMPANY, *Appellant.*

October Term, 1887.

February, 1888.

BRIEF ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS.

Under Article 4, Sect. 1, of the Constitution of Massachusetts, and in pursuance of an act of the Legislature cited in appendix "A," there was levied on the defendant an exaction of $10,830.00.

The Western Union Telegraph Company resists the payment of the exaction on three grounds, namely: —

1. Because the exaction is an interference with Federal franchise.

2. Because it interferes with interstate commerce.

3. Because the exaction is inequitable, in that it taxes real estate out of the State, which is otherwise there taxed.

The first two grounds will be considered together.

I.

assuming that

This is not a tax on property but an excise, and in order that it may be reasonable, the amount to be paid is left, by the statute, to be measured by the aggregate market value of the shares of the capital stock. Such a mode of taxation is legal.

Portland Bank *v.* Apthorp, 12 Mass. 252.
Com. *v.* Savings Bank, 5 Allen, 428.
Com. *v.* Hamilton Manuf. Co., 12 Allen, 305–9.
Queen *v.* Arnand, 9 Q. B. 806–817.
Utica *v.* Churchill, 33 N. Y. 161, 237.
Van Allen *v.* Assessors, 3 Wall. 573.
Att'y-Gen'l *v.* Bay State Mining Co., 99 Mass. 148.

A sovereignty has a right to adopt any standard of measurement, and may follow its caprice even in this respect.

Bank of Commerce *v.* New York City, 2 Black, 620, 630.
Delaware Railroad Tax Case, 18 Wall. 206–225.
State Tax on Railway Gross Receipts, 15 Wall. 284–293.

"The Court cannot sit in judgment upon the question of whether the Legislature has exercised its taxing power wisely or unwisely over objects within its discretion. There is always a considerable latitude of discretion in every government in the exercise of its taxing power, both as to objects and the amount of discrimination in respect to both."

Bank of Commerce *v.* New York City, 2 Black, 620, 630.

In determining the merits of the claim of the defendant that the assessment is a direct imposition, or tax upon a franchise proper, and is a direct interference with right reserved

to the Federal government, to regulate commerce, it is necessary to consider the exact relation between the alleged tax and the measure of taxation, and to distinguish between franchise proper and what is commonly called franchise or incorporeal hereditaments.

In all the controversy respecting the subject there are certain propositions that are recognized and admitted. One of these propositions is, *that a State may, by taxation or otherwise, in a certain remote degree, effect interstate commerce and the reserved right of the Federal Government to control certain franchises essential to its own operations*

"Legislation may in a great variety of ways affect commerce, and persons engaged in it, without constituting a regulation, within the meaning of the Constitution."

C. J. Wait in Wabash *v.* Illinois, 118 U. S. 557–594.
Sherlock *v.* Alling, 93 U. S. 99.
State Tax on Railroad Gross Receipts, 15 Wall. 284.
Munn *v.* Illinois, 94 U. S. 113.
C. B. and Q. Railroad *v.* Iowa, 94 U. S. 155.

The question then herein is, not whether or not the State of Massachusetts has affected interstate commerce or Federal franchise, but has the State, in its operations, so far affected these rights as to come up to the objectionable degrees of interference termed "regulation." The State cannot levy a tax or enact a law that does not in some degree affect interstate commerce, and in that light, broadly stated, a State has a right to interfere with interstate commerce. The right to exist or the necessities of existence implies this.

This discussion of the remoteness or degree of interference involves two of the three questions raised by the defendant, namely, the interstate question and the Federal franchise question, both of which may, for the present, be discussed together.

The State of Massachusetts has not substantially interfered with the reserved rights of the Federal Government respecting interstate commerce and instrumentalities necessary for the operations of the United States.

The amount of exaction in question is measured by the value of the defendant's stock represented by the proportionate part of the defendant's line in Massachusetts.

~~Unquestionably~~, this is an excise, and not a "property tax"; ~~but~~ in determining the question of remoteness of the exaction we may assume for the present that it is levied upon, instead of by, the incorporeal property of the company.

The theory of the defendant is that some special privilege within the territory of Massachusetts was granted by the United States to the telegraph company, and that they have special rights in Massachusetts by reason thereof. Observe Chapter 109, Sections 1, 2, 3, of the Public Statutes of Massachusetts, quoted in Appendix B.

Under this law the highways of Massachusetts are practically open for instruments of transmitting intelligence; the Act of Congress gave the Western Union Telegraph Company nothing that they did not practically have before. This corporation, so far as Massachusetts is concerned, is practically claiming, that for nothing as a consideration, they have bought the right of exemption from taxation within that State. As a matter of fact the arrangements, so far as that territory is concerned, simply amounted to a contract, by legislation, to carry government messages at a special rate; and there is no more reason for exempting this telegraph company from taxation than for exempting every railroad, steamboat, stage-coach that carries a mail bag.

The naked franchise of the company, or the privilege conferred by the State of Massachusetts, — the right to exist and the right to do business, — form but an inconsiderate part of the intangible property of the company, which

intangible property constitutes the principal part of the value of the defendant's stock.

The principal value in this measure of taxation is not the right to exist but the *product* of this existence, namely, the good-will of the business, the system, acquaintance, hold on customers or patrons, experience, knowledge of the art, ability to use common instrumentalities and earn money, potentialities.

Com. *v.* Hamilton Manuf. Co., 12 Allen, 298–303.

Observe that no monopoly goes with the franchise and no special privilege that is not open to all corporations of this class which may be organized under the general law of Massachusetts, or under the law of any State.

It is not necessary herein to distinguish between domestic and foreign corporations: the power of the State extends over each within its limit.

See Paul *v.* Virginia, 8 Wall. 168.
Gloucester Ferry Co. *v.* Pa. 114 U. S. at p. 209.
R. R. Co. *v.* Peniston, 18 Wall. 5–34.

A foreign corporation having a place of business within the Commonwealth may be taxed on the franchise exercised within the State.

Commonwealth *v.* Lancaster Savings Bank, 123 Mass. 495.

On this theory, practically, the case comes under the rule that when the product of that which is exempt from taxation becomes a part of a general property or wealth, it may be included with such other property for taxation.

But to return to the original proposition. As this is not a tax on the *value* of the franchise, but is an excise on the franchise measured by property of the defendant — which is

mainly the product of the franchise, — the exaction is removed another step from the objection claimed.

The case falls under Com. *v.* Hamilton Manuf Co., 12 Allen, 298, where it appeared that certain government bonds were included in the value of the stock of an institution, upon which an excise was exacted and measured, as in this case, by the value of this stock.

See also Woodruff *v.* Parham, 8 Wall. 123.
Manufacturers Ins. Co. *v.* Loud, 99 Mass. 146.

I here review the leading authorities on the general subject of the right of a State to measurably interfere with Federal power, and instrumentalities employed in the operations of the general Government.

In the case of Delaware Railroad Tax, 18 Wall. 207, it is held that an assessment of a tax on a railroad corporation, extending without the State, was valid, against the claim of counsel, that it imposed a tax upon property beyond the jurisdiction of the State; that it conflicted with the power of Congress to regulate commerce among the several States, and that it interfered with the right of transit for persons and property from one State into or through another. In that case it was shown that though about one fourth of the road was in the State of Delaware, nearly all the shares of stock were owned by persons who were not citizens of that State. Nevertheless, the tax was sustained.

Referring to the objection that the tax was in conflict with the power of Congress to regulate interstate commerce, or the right of transit of persons and property from one State into or through another, the Courts say the tax imposed by the act in question affects commerce just in the same way, and no other, that a tax of any kind necessarily increases the expense attendant upon the possession of the thing taxed; that taxation produces this result of itself constitutes no objection to its constitutionality. As was justly observed by

the Court in a recent case, "every tax upon personal property or upon occupations, business, or franchise, affects more or less the subjects and operation of the commerce, yet it is not every thing that affects commerce that amounts to a regulation of it within the meaning of the Constitution.

It was held in the State Tax on Gross Receipts Case, 15 Wall. 284–295, "that the exercise of the authority which every State possesses, to tax its corporations and all their property, real, personal, and their franchise, and to grade the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other States, and the tax is not on imports, exports, or tonnage, or transportation to other States, cannot be regarded as conflicting with any constitutional power of Congress."

In Commonwealth *v.* People's Five Cents Savings Bank, 5 Allen, 428–436, it is said that perfect equality in the assessment of taxes is unattainable. Approximation to it is all that can be had. Under any system of taxation, however wisely and carefully drawn, a disproportionate share of the public burden will be thrown on certain kinds of property, because they are visible and tangible, while they are of a nature to evade vigilance. It is only where statutes are passed which impose taxes on false and unjust principles, or operate to produce gross inequality, so that they cannot be deemed in any just sense proportional in their effect on those who bear public charges, that courts can interfere and arrest the course of legislation by declaring such an enactment void.

"A tax would not be declared illegal and void as being unreasonable unless it was plainly and grossly oppressive and unequal, or contrary to common right; nor would it be held to be unproportional unless it violated clearly the rules of proportion which should be properly applied to the subject of a tax. An excise tax is legal if it applies alike

on all persons who exercise a particular employment or enjoy the same privilege.

Oliver *v.* Washington Mills, 11 Allen, 268, 279.

A presumption always exists in favor of the validity of an act of the Legislature; and that it will not be declared void appears clearly to be a violation of the fundamental principles of the Government. Every tax or assessment imposed on the corporation and paid out of its funds tends to diminish the amount of property held in trust for depositors, but does it necessarily follow that a franchise tax on this class of corporations is a tax on property, as was said in Howe *v.* Cambridge, 114 Mass. 388, 391? The Court cannot say as a matter of law that the principle adopted is in unjust proportions.

Commonwealth *v.* Hamilton Manf'g Co., 12 Allen, 298, 301

The case is distinguishable from the State Freight Tax Case, 15 Wall. 232, in that there a tax was directly imposed upon exercises of franchise in an interstate transaction. This is very different from a tax upon the value of the intangible property of a corporation into which the element of profit-making business from interstate transactions enters only as one of many incidents.

The case of Fargo *v.* Michigan, 121 U. S. 230, referred to by the defendant, is clearly distinguishable from the case at bar, for there the tax was levied upon freight from some point without to some point within, and *vice versa*. It having been held that such is interstate commerce, the tax assessed directly on the transaction was held within the prohibition of the law.

In the Gross Receipts Case, 15 Wallace, 284, the distinction herein referred to is fully recognized. The Court say that the tax was levied upon money in the treasury of the corpo-

ration, and upon property within the limits of the State which had passed beyond the stage of compensation for freight, and had become incorporated into the general mass of the company's property. While it must be conceded a tax upon interstate transportation is invalid, there seems to be no stronger reason for denying the power of a State to tax the fruits of such transportation after they have become intermingled with the general property of the carrier than there is for denying her power to tax goods which have been imported after their original packages have been broken, and after they have been mixed with the mass of personal property of the country."

The decision of the Supreme Court of Massachusetts in Manufacturers Ins. Co. *v.* Loud, 99 Mass. 146, is clearly against the general proposition claimed by the defendant herein. In that case it was claimed that there should be a deduction from the market value of the shares of stock, the value of the United States bonds owned by the corporation. It was held therein that the tax imposed under the Statute of 1864, Ch. 208, was a tax upon the franchise of the corporation and not upon its property; that no deduction of value of such bond was required in order to arrive at the basis of taxation contemplated by the statute, nor by reason that the specific exemption from taxation by the Constitution and laws of the United States. No part of the tax is assessed upon property of the corporation in their bonds, nor upon property of the corporation.

In the case of Hamilton Co. *v.* Massachusetts, the court say that the fact that the corporation has invested in Federal securities does not vary the right of the State to tax the corporation in proportion to the value of its franchise, etc.

Hamilton Co. *v.* Massachusetts, 6 Wall. 632–639.

And herein is this distinction: the exaction in question is not assessed upon the receipts from commerce, and is not

even measured by such receipts, but by a standard that is entirely collateral thereto; the standard is a certain comprehensive estimate which the business community has placed upon the value of the facilities and instrumentalities of the concern and its ability to earn money.

The stock may be valuable before a dollar is earned from interstate or Government work; the value of the stock may have been largely in anticipation of profits and not on account of profits earned. The concession of this corporation to the General Government for the purpose of obtaining the Federal patronage referred to may have been so great that no profit at all came from the government work; or it may have done such work at an absolute loss, so that, instead of the government business contributing towards the value of the stock and ultimately the tax to be paid, it has operated to lessen the tax which otherwise would have accrued; or, in other words if the Western Union Telegraph Co. has made an unprofitable contract with the Government, the same is not only not taxed by practical results in any remote sense, but that business has operated as an abatement against the State of Massachusetts of a legitimate tax which she otherwise would have received. Every bad contract entered into by said company depreciates the value of the stock, and of course lessens the amount of excise collectable under the law.

The distinction here made is consistent with the ruling of this Court in Philadelphia Steamship Co. *v.* Pa., 122 U. S. 326–341. In that case the tax was directly upon the gross receipts derived exclusively from interstate business, and the case is entirely within the rule suggested respecting tax on goods that have been imported. Had the State of Massachusetts followed the interstate and United States franchise transactions and levied upon the receipts from such business an exaction, instead of upon a certain general wealth, in the constitution of which the interstate and franchise money had

been indefinitely mingled with other elements, this case would have assumed another aspect. There was in that case no such degree of remoteness between the interstate and Federal business and the final exaction, as in the case at bar.

The theory of the defendant violates a principle essential to the existence of the Government, and one thoroughly recognized by the framers of the Constitution, namely, that all property should be subject to an appropriate burden of taxation, and that all who enjoy the benefits of a government should contribute towards its support.

It cannot be presumed that the framers of the Constitution intended that those persons who by special appointment happen to wait upon the Government should, on account of such offices, be exempt from common burdens and responsibilities of citizenship.

The Constitution simply contemplated protection to citizens of different States against laws which should substantially restrain commerce among them, but it was in no wise intended to relieve inhabitants of a territory from common incidents to citizenship.

The defendant may, with the same propriety, claim that stockholders of the Western Union Telegraph Company cannot legally be taxed on their shares because their corporation waits upon the United States, or that a telegraph operator should not pay a poll-tax because he is an instrument employed by the Government in the exercise of its reserved powers.

The law being valid, it is not objectionable that a proceeding to enforce it interrupts the company in its work. A tax sale would have the same effect. In this respect the company is no more protected than are all instrumentalities employed in carrying the mail and transmitting intelligence. Every instrument employed in sending messages may be attached and sold on execution.

In the Pennsacola Telegraph Company case, the State of

Florida attempted to exclude the Western Union Telegraph Company from crossing the State, over land where it had secured the right of way. The Court held that the statute of exclusion was void, but the right recognized in the foreign company as secured under the Act of Congress referred to was a negative one. The Court say "that State sovereignty is not interfered with": that the foreign company for the purpose of its business cannot enter private property without the consent of the owner, even though the same be a post road.

See also Dickey *v.* Turnpike Road Co., 7 Dana, 113.

The State Tax on Gross Receipts Case, 15 Wall. 284, is squarely in point. There it was held that the tax on gross receipts which might include income from interstate business was valid.

"A power to tax to the extent stated in this case may be essential to the healthy existence of the State governments, and the Federal Constitution ought not to be so construed as to impair, much less destroy, anything that is necessary to their efficient existence."

The case of Gloucester Ferry Co. *v.* Penn., 114 U. S. 196, is distinguishable from the case at bar in that the said Ferry Company did exclusively an interstate business; and, as stated in the report, never transacted any other business.

The case of Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, is not in point. In that case a tax of $50 per annum for every coach used was levied. In the case of Fargo *v.* Michigan, 121 U. S. 245, a similar tax was imposed, except it was measured by the gross receipts for carrying passengers and freight from some point within to some point without the State, or *vice versa*. The case of Wabash Railroad Company, where the State attempted to regulate the rate of tariff from Peoria, Ill. to New York, and in Crandall *v.* Nevada, 6 Wall. 35, based on similar

facts, are not precedents for the determination of the present case.

In Thomson *v.* Pacific Railroad Company, 9 Wallace, 590, the Court say: "But we are not aware of any case in which the real estate or other property of a corporation not organized under an act of Congress has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the Government."

This decision was quoted in Railroad Co. *v.* Peniston, 18 Wall. 5–33, wherein the Court say: "It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the Government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue, without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the Government."

Under this head observe powers of State for regulation of pilots and pilotage, Cooley *v.* Philadelphia, 12 How. 299. In this case the Court say the law did not pass the appropriate line of limitation.

This case was affirmed in *ex parte* McNeil, 13 Wall., at p. 242, where the Court say, "We are entirely satisfied with that adjudication and reaffirm doctrines which it lays down. It is conclusive upon this branch of the case."

In Osborn *v.* Mobile, 16 Wall. 479–481, the Court held that a city ordinance taxing an express company doing business beyond State limits was within the general authority of the State to tax persons, property, business or occupations within their limits. In this case the Court says, after acknowledging the difficulty of drawing the line between constitutional and unconstitutional taxation, and asserting that

there is such a line: "It is as important to leave the rightful powers of the State in respect to taxation unimpaired as to maintain the powers of the Federal Government in their integrity."

And see Railroad Company *v.* Fuller, 17 Wallace, 560–568.

The pivotal question, as stated in the case of the State Freight Tax, 15 Wall. 232, 272, is not what is the form or agency used, but what is the subject upon which the burden falls.

It is intimated by the Court in this case that if the tax had been assessed upon the franchise or the business done the law might have been sustained.

"The causal circumstance of its being employed by the Government in the transaction of its official business can no more exempt its private business from the operation of that power than it would exempt the private business of any individual employed in the same way."

Osborn *v.* United States Bank, 9 Wheat. 860.

This case is distinguishable from Osborn *v.* United States Bank, *ubi supra*, and McCulloch *v.* State of Maryland, 4 Wheat. 360, in that the Western Union Telegraph Company was not created by the Government as an instrument for carrying into effect the powers vested in the United States. That corporation was an instrument "which the Government found ready made," and simply adapted to its purpose, like a thousand other instrumentalities of which the Government may make use as a common patron or customer, or as a favored party by virtue of stipulation and contract.

The institution involved in McCulloch *v.* Maryland, 4 Wheat. 316 was, in the language of Chief Justice Marshall, "not considered as a private corporation whose principal ob-

ject is individual trade and individual profit, but a public corporation created for public and national purpose."

Osborn *v.* United States Bank, 9 Wheat. 860.

The right to tax is an incident to sovereignty, and is co-extensive with that to which it is an incident. All objects over which the sovereign power of a State extends are subject to taxation. The sovereignity of a State extends to every thing which exists by its own authority, or as introduced by its permission.

McCulloch *v.* Maryland, 4 Wheat. 429.

II.

A tax or excise in "exact equality" is impossible; the best that can be done is to estimate and approximate. No two corporations pay a tax on exactly the same scale; shades of double taxation, unequal taxation and discrimination will appear in any law that can be written. In the tax on stock in foreign corporations held by citizens the local real estate is included in the value of the stock and the tax is held valid. See Dwight *v.* Boston, 12 Allen, 316.

As a matter of fact, under the present law, the Commonwealth of Massachusetts does not get its fair proportion of excise. Observe the method of assessment: the number of miles of line (not wire) is taken as a basis. Massachusetts, with her myriads of industries teeming with active energy, is counted mile for mile of line with a blank territory where for a hundred miles there is not an instrument used or any source of revenue.

Assuming that the defendant has real estate upon which it pays forty-eight thousand dollars tax in New York, the effect upon the Massachusetts valuation is but the ratio of one to fifty.

The alleged inequitable or double taxation does not in reality exist under the system adopted by the State, unless

it exists in assuming that a proportionate part of the whole real estate owned by the company is situated within the State, which assumption in the abstract is reasonable. The exact facts are practically unobtainable by Massachusetts officers, and they have the right to base their action on any reasonable assumption.

A railroad which projects beyond the State half its distance is assessed here half its stock valuation; that is, one half the property, or the proportionate part existing out of the State, is at once released; the value of the stock in gross is made up of its real estate, its franchise, etc. When the out side portion is cut off the real estate element is included in the elimination. The inside real estate need not have been separated except that it had paid a tax once in its locality. The question of whether or not the outside real estate shall be separated from the accompanying outside franchise, etc., is a matter for the determination of another State, and the appropriate part of the corporation property, both tangible and otherwise, is left by this State for the neighboring sovereignty. The separation by the State officers of local property here did not exempt such property from taxation, neither did the failure to separate the outside real estate from other outside property, which made up the total valuation, expose that specially to taxation. If the real estate of this company outside the State bears the same proportion, with reference to the total real estate owned by the company, that the outside mileage bears to the total mileage of the line, then the system adopted is in exact equity.

The State also assumes, contrary to the fact and against its own interest, that ten miles of line with one wire in Nebraska contributes as much toward the income of the company as ten miles of line with fifty wires does in Massachusetts.

There are no corporations which have lineal property, except railroads, telegraph and telephone companies, upon which the mileage plan can be applied, and no comparison suggested by counsel there is applicable.

To this point the exaction has been considered as an excise; but under the statute the assessment may be sustained as a property tax; there is an assumption in favor of the State in every view of the law. Section 42, of the Public Statutes of Mass., cited in the appendix, provides that foreign corporations shall pay "a tax at the same rate and to be ascertained and determined in the same manner as provided in Sec. 40." Section 40 provides that every domestic corporation shall pay a tax upon its franchise, to be determined in a particular manner; the manner of determining the tax is what is included in the reference from Sec. 42.

A State may properly adopt the same means of determining an excise and a property tax, care being taken that the property tax is proportionate upon valuations, uniformly assessed, and in proportion to the amount to be raised.

The record shows that the appellant has a large amount of telegraph line and taxable property in Massachusetts which is only reached for taxation in the proceeding complained of, and it does not appear, nor is it claimed that the value of this visible property is less than $750,952—the amount to which the uniform tax rate was applied. The question is, Does it necessarily follow from the manner of assessment that gross injustice has been done? Absolute accuracy is impossible. The lineal plan is *prima facie* equitable. It is not enough simply to show that there is an element of inequality, the appellant must further show that as a fact, everything considered, gross inequality existed in the apportionment of the public charge, and that in fact it was assessed a larger sum than corresponded to the value of its taxable property in the State. It is not necessary to determine which was the intention of the law if under each the tax may be sustained.

A.

CONSTITUTION AND STATUTES OF THE COMMONWEALTH.

Part 2, Ch. 1, Sect. 1, Art. 4, of the Constitution gives the Legislature power to impose "proportionate and reasonable asses ments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying within the Commonwealth," and also to impose "reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured, or being within the same."

Section 42 of chapter 13 of the Public Statutes reads: —

SECT. 42. Every corporation or association chartered or organized elsewhere, which owns, or controls and uses, under lease or otherwise, a line of telegraph within this commonwealth, shall make all the returns prescribed in section thirty-eight to be made by telegraph companies within the commonwealth, excepting the list of its shareholders; and shall annually pay a tax at the same rate, and to be ascertained and determined in the same manner as is provided in section forty; and all telegraph lines within the commonwealth controlled and used by such corporation or association, shall, for the purposes of this chapter, be taken and considered as part of its own lines.

Section 38 reads: —

SECT. 38. Every corporation chartered by the commonwealth, or organized under the general laws, for purposes of business or profit, having a capital stock divided into shares, excepting banks whose shares are otherwise taxable under this chapter, and except those specified in sections forty-three and forty-six, shall annually, between the first and the tenth day of May, return to the tax commissioner, under the oath of its treasurer, a complete list of its shareholders, with their places of residence, the number of shares belonging to each on the first day of May, the amount of the capital stock of the corporation, its place of business, the par

value and market value of the shares on said first day of May. Such return shall, in the case of stock held as collateral security, state not only the name of the person holding the same, but also the name of the pledger and his residence. The returns shall also contain a statement in detail of the works, structures, real estate, and machinery owned by said corporation and subject to local taxation within the commonwealth, and of the location and value thereof. Railroad and telegraph companies shall return the whole length of their lines, and the length of so much of their lines as is without the commonwealth; other corporations required to make a return under this section shall also return the amount, value, and location of all works, structures, real estate, and machinery owned by them and subject to local taxation without the commonwealth: *provided*, that nothing herein contained shall exempt any corporation from making all returns required by its charter.

Section 40 reads: —

SECT. 40. Every corporation embraced in the provisions of section thirty-eight shall annually pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same current year, as returned by the assessors of the several cities and towns under section eighty-six of chapter eleven, upon the aggregate valuation of all the cities and towns for the preceding year, as returned under sections fifty-four and fifty-five of said chapter: *provided*, that in case the return from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination; and *provided, further*, that the amount of tax assessed upon polls the preceding year, as certified to the secretary, may be taken as the amount of poll tax to be deducted from the whole amount to be raised by taxation, for the purpose of ascertaining the amount to be raised by taxation upon property

From the valuation, ascertained and determined as aforesaid, there shall be deducted, — *First*, in case of railroad and telegraph companies, whose lines extend beyond the limits of the commonwealth, such portion of the whole valuation of their capital stock, ascertained as aforesaid, as is proportional to the length of that part of their line lying without the commonwealth, and also an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery located and subject to local taxation within the commonwealth: *second*, in case of other corporations, included in section thirty-eight of this chapter, an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery, subject to local taxation, wherever situated: *provided*, that, whenever the charter of a corporation provides a different method of ascertaining the valuation of its corporate franchise for the purposes of this chapter, the same shall be ascertained in the method provided in such charter.

Section 39 reads: —

Sect. 39. The tax commissioner shall ascertain, from the returns or otherwise, the true market value of the shares of each corporation included in the provisions of the preceding section, and shall estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on the first day of May next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this chapter. He shall also ascertain and determine the value and amount of all real estate and machinery owned by each corporation, and subject to local taxation, and of the deductions provided in the following section; and for this purpose he may take the amount or value at which such real estate and machinery are assessed at the place where the same are located as the true amount or value; but such local assessment shall not be conclusive of the true amount or value thereof.

Section 53 reads: —

Sect. 53. The tax commissioner shall, as soon as may be after the first Monday in August in each year, notify the treasurer of each corporation, company, copartnership, or

association liable thereto, of the amount of its tax under sections twenty-five, forty, forty-two, forty-five, forty-seven, fifty, and fifty-two, to become due and payable to the treasurer of the commonwealth within thirty days from the date of such notice: *provided*, that it shall not be due and payable earlier than the first day of November. Such notice shall also state that within ten days after the date thereof the said corporation, company, copartnership, or association may apply for a correction of said tax, and be heard thereon before the board of appeal hereinafter established.

Section 61 reads: —

SECT. 61. Any party aggrieved by the decision of the tax commissioner arising under the provisions of sections twenty-five to fifty-eight inclusive, excepting corporations named in section forty-six, may apply to the board of appeal constituted under the provisions of the following section for a correction of the same.

Section 62 reads: —

SECT. 62. The treasurer and the auditor of the commonwealth, together with one member of the council to be named by the governor, shall constitute a board of appeal, to which board any party aggrieved by a decision of the tax commissioner upon any matter arising under this chapter, from his decision upon which an appeal is given, may apply within ten days after notice of such decision for a correction of the same. Upon such appeal said board shall, as soon as may be, give a hearing to such party, and shall thereupon decide the matter in question, and notify the tax commissioner and the party appealing; and such decision shall be final and conclusive as to the rights of the parties affected, although payments may have been made as required by the decision of the tax commissioner appealed from. Any over-payment of tax, determined by the decision of said board of appeal, shall be reimbursed from the treasury of the commonwealth.

Section 54 reads: —

SECT. 54. Any corporation, company, copartnership, or association taxable under the provisions of sections forty,

forty-two, forty-three, forty-five, forty-seven, fifty, and fifty-two, neglecting to make the returns required by this chapter, or refusing or neglecting, when required thereto, to submit to the examinations provided for therein, shall forfeit two per cent. upon the par value of its capital stock; all which penalties may be recovered by an action of tort, brought in the name of the commonwealth, either in the county of Suffolk or in the county where the corporation is located. If any corporation, company, copartnership, or association fails to pay the taxes required to be paid to the treasurer of the commonwealth under the provisions of said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, he may forthwith commence an action of contract in his own name, as treasurer, for the recovery of the same, with interest at the rate of *twelve per cent* per annum until the same are paid. All penalties under this section, and under sections seven, forty-seven, fifty, and fifty-two, may also be enforced, and all taxes under said sections forty, forty-two, forty-three, forty-five, fotty-seven, fifty, fifty-one, and fifty-two, may also be collected by information brought in the supreme judicial court at the relation of the treasurer of the commonwealth, and upon such information the court may issue an injunction restraining the further prosecution of the business of the corporation, company, copartnership, or association, until all such taxes due or penalties incurred shall be paid, with interest at the rate aforesaid, and costs. In any proceeding under this section the certificate of the tax commissioner or his deputy shall be competent evidence of all determinations made and notices given by him, and of all values, amounts, and other facts required to be fixed or ascertained by him under this chapter.

These sections have been followed except that the respondent *did* not apply *to the Board of Appeal*. It is conceded also that the respondent has not paid the tax assessed.

B.

PUBLIC STATUTES, CHAPTER 109.

SECTION 1. Every company incorporated for the transmission of intelligence by electricity shall possess the powers and privileges, and be subject to the duties, restrictions, and liabilities, prescribed in this chapter.

SECT. 2. Each company may, under the provisions of the following section, construct lines of electric telegraph upon and along the highways and public roads, and across any waters within the commonwealth, by the erection of the posts, piers, abutments, and other fixtures (except bridges) necessary to sustain the wires of its lines; but shall not incommode the public use of highways or public roads, nor endanger or interrupt the navigation of any waters.

SECT. 3. The mayor and aldermen or selectmen of a place through which the lines of a company are to pass shall give the company a writing specifying where the posts may be located, the kind of posts, and the height at which and the places where the wires may run. After the erection of the lines, having first given the company or its agents opportunity to be heard, they may direct any alteration in the location or erection of the posts, piers, or abutments, and in the height of the wires. Such specifications and decisions shall be recorded in the records of the city or town.